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In the Supreme Court
OF THE
United States

October Term, 1967

No. 1259

The Denver & Rio Grande Western Railroad Company,
Petitioner,
vs.
United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered August 8, 1967 (Petition for Rehearing denied December 26, 1967), reversing the judgment of the United States District Court for the District of Utah.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in 385 F.2d 161 (10th Cir. 1967). A copy of the opinion is attached hereto as

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

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CITATIONS TO OPINIONS BELOW

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Appendix A. Relevant unreported Memorandum Decisions were rendered by the United States District Court for the District of Utah in this case and in a companion case, *United States of America* v. *Western Pacific Railroad Company*, No. C 221-65, in the United States District Court for the District of Utah. Copies of the District Court decisions are attached hereto as Appendix B-1 and Appendix B-2.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit of which review is sought was entered on August 8, 1967. A Petition for Rehearing was timely filed, and was denied on December 26, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and the applicable Rules of this Court.

QUESTION PRESENTED

Whether Ex Parte No. 73 (49 C.F.R. §§ 142 et seq.), a regulation of general applicability adopted by the Interstate Commerce Commission, is an "order" of the Interstate Commerce Commission within the meaning of Section 16(8) of the Interstate Commerce Act (49 U.S.C. § 16(8)).

STATUTES AND REGULATIONS INVOLVED

The statutory provisions here involved are Sections 3(2), 10(1), and 16 of the Interstate Commerce Act (49 U.S.C. §§ 3(2), 10(1), and 16), Section 10 of the Elkins Act (49 U.S.C. § 41 (1), and Sections 551(4) and 551(6) of the Administrative Procedure Act (5 U.S.C. §§ 551(4) and

551(6). These provisions are set out verbatim in Appendix C hereto.

The regulations here involved are the "credit regulations" adopted by the Interstate Commerce Commission in Ex Parte No. 73. These regulations, including the published administrative history with respect thereto, are set out verbatim in Appendix D hereto.

STATEMENT

Proceedings Below

This is a civil forfeiture suit initiated by the Bureau of Enforcement (hereinafter called the "Bureau"), a semi-autonomous investigating and prosecuting sub-agency of the Interstate Commerce Commission (hereinafter called the "Commission"), claiming forfeitures under Section 16(8) of the Interstate Commerce Act (49 U.S.C. § 16(8)) for alleged violations by Petitioner of credit regulations adopted by the Commission and known as Ex Parte No. 73.

Petitioner moved to dismiss respondent's complaint upon the ground that no claim upon which relief could be granted was stated therein. The District Court granted petitioner's Motion to Dismiss, stating his reasons therefor in his Memorandum Decision in a companion case:

> "I am of the opinion that Ex Parte No. 73 is not such an order as is contemplated by Section 16 of Title 49 United States Code, and that the alleged conduct of the defendant does not constitute a knowing failure to obey any order of the Interstate Commerce Commission. Ex Parte No. 73 is not the type of "order" contemplated by 49 United States Code Section 16(8). Ex

> Parte No. 73 is legislative in character and has the same force and effect as it would have if enacted by Congress. It is in effect a general modification of Section 3 of Title 49 which prohibits the surrender of freight without first collecting the freight charges." (Appendix B-2, p. 2.)

The District Court observed that, to him, "there would be serious problems of due process were I to hold here that without an administrative order directed specifically to the complained conduct and an opportunity to be heard thereon, the defendant in this proceeding would be liable for the forfeiture in question." (Appendix B-1, p. 1.)

After dismissal of its complaint in the District Court, respondent appealed the Judgment of dismissal to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals found no distinction between orders of the Commission adjudicatory in character and rules or regulations of general applicability, legislative in character, notwithstanding that the Administrative Procedure Act, in Sections 551(4) and 551(6) (5 U.S.C. §§ 551(4) and 551(6)), clearly defines this very distinction. The Court of Appeals concluded that "under the procedure adopted by Congress, there is a judicial forfeiture for disobedience of 'any order' made under § 3(2) without regard to whether that order is legislative or adjudicatory." (Appendix A, p. 4.)

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals has decided an important question of federal law erroneously. This question is one of substantial public importance that should be settled by this Court.

The questions raised by the decision and opinion of the Court of Appeals are of the utmost public interest and importance. As the Court of Appeals correctly notes, the case as presented to it was one of first impression, there being no reported decision involving the claims asserted by respondent in this proceeding. (Appendix A, p. 3.) The claims asserted by respondent are novel. Although Ex Parte No 73 has been in effect since 1920, and Section 16(8) of the Interstate Commerce Act has been in effect since before 1920, not until 1964 did the Bureau assert any claim that Ex Parte No. 73 was an order within the meaning of Section 16(8), and that a supposed violation of the regulatory provisions of Ex Parte No. 73 could provide the foundation for the severe forfeiture claims under Section 16(8).

There is presently pending in the United States District Court for the District of New Jersey a civil suit against the Staten Island Rapid Transit, Civil No. 1042-65. The Bureau has advised the Baltimore and Ohio Railroad Company of numerous claimed similar violations and there is a threat of litigation arising out of such claims. (See Brief of Amicus Curiae, the Baltimore and Ohio Railroad Company, in support of Petition for Rehearing in the Court of Appeals.) There is pending in the United States District Court for the Eastern District of Pennsylvania a civil suit against the Pennsylvania Railroad Company, Civil No. 39697, also involving these same issues.

Prior to mid-1964, neither the Bureau nor the Commission asserted any claim resembling that set forth in the complaint in this action. In November, 1964, the first such action was initiated against the Richmond, Fredricksburg and Potomac Railroad Company in the United States

District Court for the Eastern District of Virginia, Civil No. 3494. Other actions were filed subsequently, including the present action against Petitioner and the companion case against the Western Pacific Railroad Company. These efforts to seek harsh forfeiture penalties under Section 16(8) of the Interstate Commerce Act are made in the face of 44 years of uniform administration of the Interstate Commerce Act and the Credit Regulations of the Commission adopted pursuant thereto. Prior to the novel efforts of the Bureau to bring these issues within the harsher penalties of Section 16(8) of the Act, all actions involving claimed violations of the credit regulations were brought under the criminal provisions of the Interstate Commerce Act and the Elkins Act (49 U.S.C. §§ 10(1) and 41(1)). This Court should issue its writ of certiorari to review the judgment of the Court of Appeals in this case for the following reasons:

1. The decision of the Court of Appeals erroneously determines that Ex Parte No. 73 is an order within the meaning of Section 16(8) of the Interstate Commerce Act.

2. The decision of the Court of Appeals disregards in their entirety the controlling provisions of the Administrative Procedure Act distinguishing plainly between an order and a regulation or rule.

3. The decision of the Court of Appeals creates a substantal conflict between the application of the criminal sanctions of the Interstate Commerce Act and the Elkins Act, contained in 49 U.S.C. Sections 10(1) and 41(1), and the provisions of Section 16(8) of the Interstate Commerce Act, and permits the Bureau to seek inconsistent sanctions for the same claimed unlawful conduct.

Discussion of these points follows:

1. THE DECISION OF THE COURT OF APPEALS ERRONEOUSLY DETERMINES THAT EX PARTE NO. 73 IS AN ORDER WITHIN THE MEANING OF SECTION 16(8) OF THE INTERSTATE COMMERCE ACT.

Section 3(2) of the Act prohibits delivery of freght without payment of charges "except under such *rules and regulations* as the commission may from time to time prescribe. . . ." (Emphasis added.) Ex Parte No. 73 is such a *rule or regulation.* By its terms, Ex Parte No. 73 adopts "the following rules and regulations. . . ." Ex Parte No. 73 is not an order in any sense of the word. More particularly, it is not an order within Section 16 of the Act. It is a set of rules and regulations of general applicability, as contemplated by Section 3(2) of the Act pursuant to which it was adopted by the Commission. If the conduct complained of in this action violates anything, it violates Section 3(2) of the Act, since the conduct allegedly involves an extension of credit by petitioner in excess of that permitted by Ex Parte No. 73. It is Section 3(2) that prohibits the extension of credit, not Ex Parte No. 73. Section 3(2) prohibits the extension of credit "except under such rules and regulations as the commission may from time to time prescribe. . . ." Ex Parte No. 73 constitutes the rules and regulations of the Commission permitting the limited extension of credit. Section 16(8) does not afford a remedy for violation of Section 3(2) of the Act. That remedy is found only in the criminal sanctions of the Act including Section 10(1) of the Act and Section 10 of the Elkins Act.

The Court of Appeals, in holding that Ex Parte No. 73 is an order within the meaning of Section 16(8), relies upon "the plain language of the statute." (Appendix A, page 4.) The Court of Appeals then goes on to hold that there is absolutely no distinction between orders "legislative" in character and orders "adjudicatory" in nature. This holding violates the plain and obvious meaning not only of the statute but also of Ex Parte No. 73 itself. As has been noted, Ex Parte No. 73 adopts "the following rules and regulations. . . ." This is the Commission's own characterization of the contents of Ex Parte No. 73. As has also been noted, Section 3(2) of the Act does not contemplate the adoption of *orders*, but contemplates the adoption of *rules and regulations*. Rules and regulations are what the Commission adopted in Ex Parte No. 73.

Section 16(8) of the Interstate Commerce Act (hereinafter called the "Act") is applicable only to "Any carrier . . . who knowingly fails or neglects to obey any order made under the provisions of Sections 3, 13 or 15 of this title. . . ." (49 U.S.C. § 16(8).) The Bureau contends that Ex Parte No. 73 is an "order made under the provisions of" Section 3 of the Act. Section 16 of the Act, however, read in its entirety, is clear as to what constitutes an "order" within its terms. Section 16(1) provides as follows:

> "If, after hearing on a complaint made as provided in Section 13 of this title, the commission shall determine that any party complainant is entitled an an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 16(2) authorizes suit to enforce such an order in the District Courts of the United States and in state courts. Section 16(3) imposes limitation periods upon the commencement of actions both before the Commission and in the courts to enforce orders of the Commission. (See particularly Section 16(3)(f) providing that "A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.") Section 16(4) provides for joinder of parties, service of process, and judgment in suits to enforce such orders. Section 16(5) provides for service upon the parties of orders of the Commission and notices of proceedings. Section 16(6) provides for suspension or modification by the Commission of such orders. Section 16(7) imposes upon carriers the duty to observe and comply with such orders. Section 16(8), the section upon which the Bureau here relies, imposes severe penalties for the failure or refusal to obey such orders of the Commission as are made under certain sections of the Act. Sections 16(9) through 16(13) contain other provisions relative to orders issued by the Commission after proceedings in compliance with Section 16(1).

It is true that Section 16(1) refers only to complaints made as provided under Section 13 of the Act, while Section 16(8) refers to orders made under Sections 3, 13 or 15 of the Act. Petitioner contends that the plain meaning of Section 16, read in its entirety, is that the only conduct punishable under the harsh provisions of Section 16(8) is violation of an order meeting the procedural requirements of the other provisions of Section 16. Even if Section 16 is broader in its scope than Section 16(1), it is nevertheless

clear that Congress contemplated compliance with rather strict procedural safeguards in the entry of orders, the violation of which would be cognizable under Section 16(8).

Section 16(8), in reality, provides a penalty for punishments of contempt of the Commission, committed by violation of a direct and mandatory order. No violation of such an order is claimed here.

Ex Parte No. 73 is not an order within the meaning of Section 16 of the Act, or any subdivision thereof. No proceedings were had before the Commission as required by Sections 16(1) and 16(5). Ex Parte No. 73 does not order, direct, command or enjoin petitioner, or anyone, to do or refrain from doing anything. Ex Parte No. 73 is a permit to railrads authorizing them to surrender freight without prepayment of charges and to extend limited credit to shippers under the particular circumstances set forth in the regulations.

It is clear that Ex Parte No. 73 is not and cannot be an order of the Commission within the meaning of Section 16, and subdivision 8 thereof, of the Act.

2. THE DECISION OF THE COURT OF APPEALS DISREGARDS IN THEIR ENTIRETY THE CONTROLLING PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT DISTINGUISHING PLAINLY BETWEEN AN ORDER AND A REGULATION OR RULE.

It is clear that Ex Parte No. 73 is a "rule" within the meaning of Section 551(4) of the Administrative Procedure Act and not an order within the meaning of Section

551(6) of that Act. Section 551(4) defines a rule as "the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy . . . and includes the approval or prescription for the future of rates, wages, . . . services or allowances therefor . . ., or practices bearing on any of the foregoing." Section 551(6) of the Administrative Procedure Act defines an order as "the whole or any part of the final disposition . . . of an agency in a matter other than rule making. . . ." Ex Parte No. 73 is itself designated by the Commission as rules and regulations. It is filed in the office in which the Administrative Procedure Act requires that regulations be filed. Upon its adoption by the Commission as a part of the rule making processing, and by reason of the provisions of Section 3(2) of the Act, Ex Parte No. 73 became part and parcel of Section 3(2) of the Act. As such, it cannot be construed as an order.

As has been noted hereinabove, there was no compliance in connection with the adoption of Ex Parte No. 73 with the adjudicatory requirements of the Act. There was a careful general study that supported the regulation adopted. There certainly was no adjudicatory proceeding as contemplated by the Administrative Procedure Act. (See 5 U.S.C. §§ 551(7), 553, and 554.)

There is no evidence in the record that petitioner was a party to, had notice of, or had an opportunity to be heard in connection with any of the proceedings relative to Ex Parte No. 73. Petitioner does not, of course, claim ignorance of the provisions of Ex Parte No. 73. The critical fact is that Ex Parte No. 73 cannot under any circumstances

be construed as an order directed to petitioner. Accordingly, if petitioner has violated Ex Parte No. 73, it has not violated an order of the Commission directed to petitioner as contemplated by Section 16(8) of the Act.

It is clear that Ex Parte No. 73 is a regulation and not an order as those terms are plainly defined by the controlling provisions of the Administrative Procedure Act.

3. THE DECISION OF THE COURT OF APPEALS CREATES A SUBSTANTIAL CONFLICT BETWEEN THE APPLICATION OF THE CRIMINAL SANCTIONS OF THE INTERSTATE COMMERCE ACT AND THE ELKINS ACT, CONTAINED IN 49 U.S.C. SECTIONS 10(1) AND 41(1), AND THE PROVISIONS OF SECTION 16(8) OF THE INTERSTATE COMMERCE ACT, AND PERMITS THE BUREAU TO SEEK INCONSISTENT SANCTIONS FOR THE SAME CLAIMED UNLAWFUL CONDUCT.

As has been noted hereinabove, the Bureau and the Commission have for many years enforced Sections 3(2) of the Act and the related credit regulations of the Commission by proper actions at law under Section 10(1) of the Act and Section 10 of the Elkins Act. (49 U.S.C. §§ 10(1) and 41(1).) Section 10(1) of the Act provides for a fine of not to exceed $5,000.00 for each violation of certain provisions of the Act, including Section 3(2). Section 10 of the Elkins Act provides for a fine of not less than $1,000.00 nor more than $20,000.00 for certain willful violations of the Act. There is no doubt but that violations of Section 3(2), as modified and implemented by Ex Parte No. 73, are cognizable under Section 10(1) of the Act and Section 10 of the Elkins Act.

Section 16(8) of the Act, however, imposes a civil forfeiture, as distinguished from a criminal penalty, of $5,000.00 for each offense, with each day of a continuing violation being deemed a separate offense. It is inconceivable that Congress could have intended the civil forfeiture provisions of Section 16(8) and the criminal penalties of Section 10(1) and Section 10 of the Elkins Act to apply to precisely the same conduct. This inconsistency is avoided if Section 16(8) is properly construed, in its context, as applicable to orders of the Commission directed to parties after notice and an opportunity to be held have been afforded to such parties. Only such orders are orders under the proper definitions contained in the Administratve Procedure Act and under Secton 16 of the Interstate Commerce Act. To sustain the position of the Bureau in this action, as the Court of Appeals has done, is to permit the Bureau to elect between remedies that vary widely as to their nature, magnitude and purpose. The act should not be so read or applied.

The extremely tenuous position of the Bureau in asserting a remedy under Section 16(8) of the Act for purported violations of Ex Parte No. 73 is demonstrated by the Bureau's recent initiation of at least two proceedings under Secton 10(1) of the Act for violation of the credit regulations. The Court's attention is respectfully directed to *United States* v. *The Redding Company,* Criminal No. 324-65, now pending in the United States District Court for the District of New Jersey, and *United States* v. *Missouri-Kansas-Texas Railway Company,* Criminal No. 65-H-252, now pending in the United States District Court for the Southern District of Texas. In these criminal proceedings, of course, the Bureau will be obligated to establish the de-

fendants' guilt beyond a reasonable doubt and, if successful, will obtain only the penalties prescrbed by Secton 10(1) of the Act. The decision of the Court of Appeals in this case, however, would permit the Bureau, wholly in its discretion and without regard to any factual, legal or other distinctions, to seek much more harsh forfeiture penalties under Section 16(8) of the Act; and since these proceedings are civil rather than criminal in nature, the Bureau would be obligated to prove its case only by preponderance of the evidence. Again, Congress could not have intended such a result in its adoption of the Act.

CONCLUSION

If the Bureau should be successful in proving the facts alleged in its Complaint, it will not have established any violation of Ex Parte No. 73. A simple, straightforward reading of Ex Parte No. 73 will demonstrate to any reasonable mind that *it is not capable of being violated.* It is permissive, not directory. The prohibition is contained in Section 3(2) of the Act. Ex Parte No. 73 represents the rules and regulations expressly provided for in Section 3(2) of the Act, and defines the circumstances under which carriers are *permitted* to extend credit to shippers. Ex Parte No. 73 is a general regulation applicable to all railway carriers. It was adopted after a general study of the industry. It is not directed to this petitioner or to any particular carrier. It does not represent the result of a proceeding to which this petitioner was a party. It is not an order directed to this petitioner, or to anyone in particular.

Congress and the courts have devoted many years and much effort to the development of a meaningful body of

administrative law. One of the most important and fundamental results of this effort has been the clear distinction that has emerged in the cases, and that was written into the Administrative Procedure Act, between orders and regulations. The decision of the Court of Appeals disregards the distinction and, indeed, the entire structure of law upon which it is based. The Court of Appeals holds there is no such distinction. If ever there was a regulation of general application, clearly different from an order, it is Ex Parte No. 73. If ever the distinction between regulations and orders was important and sensible, as it is, it is important and sensible in this case, where the Bureau seeks to impose harsher penalties in a civil proceeding than are available to it in criminal proceedings that are expressly authorized by the Act, and that it has utilized as a means for enforcing Section 3(2) of the Act for many years.

The trial court correctly held that Ex Parte No. 73 is not an order within the meaning of Section 16, and subdivision 8 thereof, of the Act. The decision of the Court of Appeals reversing the trial court's judgment was clearly erroneous and raises questions of the highest public importance. This Court should issue its writ of certiorari to review and reverse the decision of the Court of Appeals.

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Dated: March 21, 1968.

(Appendices A, B-1, B-2, C and D Follow)

Appendix A

United States Court of Appeals

TENTH CIRCUIT

July Term, 1967

UNITED STATES OF AMERICA, *Appellant,* vs. WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 8855
UNITED STATES OF AMERICA, *Appellant,* vs. DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, *Appellee.*	No. 8856

Appeals from the United States District Court for the District of Utah, Central Division

Norman Knopf (J. William Doolittle, Acting Assistant Attorney General; William T. Thurman, United States Attorney, and Alan S. Rosenthal and Frederick B. Abramson, Attorneys, Department of Justice, on the brief) for Appellant.

Grant H. Bagley (Van Cott, Bagley, Cornwall & McCarthy on the brief) for Appellees.

Before MURRAH, Chief Judge, and PICKETT and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The United States brought separate actions under § 16 (9) of the Interstate Commerce Act, 49 U.S.C. § 16(9), against the railroads to enforce forfeitures allegedly arising from the extension of credit for freight charges in violation of an order of the Interstate Commerce Commission. The trial court sustained the railroads' motions to dismiss and the government has appealed.

On this appeal we are concerned with the interrelationship between § 3(2) and § 16(8) of the Interstate Commerce Act. Section 3(2) of the Interstate Commerce Act[1] provides in material part:

> "No carrier by railroad * * * shall deliver or relinquish possession at destination of any freight * * * transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination * * *."

Section 16 (8) of the Act reads so far as pertinent:[2]

> "Any carrier * * * who knowingly fails or neglects to obey any order made under the provisions of Sections 3, 13, or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense."

In 1920, after public hearings, the Commission adopted Ex Parte Order No. 73 which has been amended twice.[3]

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[1] 49 U.S.C. § 3(2). This subsection was added by the Transportation Act of 1920, Ch. 91, 41 Stat. 456, which terminated federal control of the railroads after World War I. During Federal control, General Order No. 25 (See 57 I.C.C. 593) required that payment of transportation charges be on a cash basis.

[2] 49 U.S.C. § 16(8). The same legislation that added § 3(2) amended § 16 (8) so as to include § 3 within its terms.

[3] See 57 I.C.C. 596A-596B, 171 I.C.C. 268, and 310 I.C.C. 391.

This order recites the provisions of § 3(2) and the investigation which the Commission made. It then reads that: "*It is ordered,* That the following rules and regulations be, and then are hereby, prescribed * * *." 57 I.C.C. 596A. As amended, these rules and regulations permit the extension of credit up to a maximum of 120 hours after the delivery of the freight.

The complaints charge each railroad with three violations because of the lapse of varying periods from 8 to 33 days between the time of delivery and the time of payment. In each instance, the railroad billed the shipper promptly but payment was not made within the required period.

The issue is one of first impression. There appear to be no reported decisions applying § 16(8) or (9). The railroads contend that Ex Parte 73 is not such an order as is contemplated by § 16(8) because it neither commands nor prohibits any action. Its only function is to ameliorate the effect of § 3(2) by permitting limited extension of credit. The trial court agreed with the railroads and held that Ex Parte 73 is not the type of order contemplated by § 16(8) because it is "legislative in character" and because it is "a general regulation."

On these appeals the validity of Ex Parte 73 is not questioned. It is a proper exercise of the power delegated by Congress to the Commission to allow "reasonable variations, tolerances and exemptions, which, because of their variety and need for detailed statement, it was impracticable for Congress to prescribe."[4] Except for Ex Parte 73 the freight could not have been delivered until the charges were paid.

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[4] *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85.

Section 16(8) imposes the sanction of forfeiture against one who "knowingly fails or neglects to obey any order made under the provisions of section 3." Section 16(9) says that the forfeiture shall be recoverable in a suit brought by the United States. An unambiguous statute must be given effect according to its plain and obvious meaning.[5] We find no ambiguity in § 16(8). It applies to any order made under § 3(2) whether that order be legislative or adjudicatory in character. To read § 16(8) as applicable only to adjudicatory orders is to disregard the plain language of the statute.

The validity of Ex Parte 73 depends on § 3(2). It is an order made under that section. Its purpose is to fill in "the interstices of the Act * * * through * * * quasi-legislative promulgation of rules."[6] The statute and the rules are exercises in futility unless some means is provided for enforcement. Section 16(8) and (9) provide the means. The statutory method of enforcement may not be avoided by the assertion that the Commission, before it invokes § 16(8), must adjudicate specific rights and responsibilities in specific instances. Under the procedure adopted by Congress, there is a judicial forfeiture for disobedience of "any order" made under § 3(2) without regard to whether that order is legislative or adjudicatory.

This conclusion raises no due process problems. The railroads have notice of the forfeiture proceedings and a

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[5] *Christner* v. *Poudre Valley Cooperative Association,* 10 Cir., 235 F.2d 946, 950. See also *Jay* v. *Boyd,* 351 U.S. 345, 357, and *United States* v. *Zions Savings and Loan Association,* 10 Cir., 313 F.2d 331, 336.

[6] *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U.S. 194, 202.

full opportunity to be heard on the question of a violation of Ex Parte 73. We know of no reason why the fact of such violation has to be adjudicated by the Commission in advance of the court proceedings.

The railroads say that the complaints do not allege any violation of the order because they show that in each instance the billing date was on or before the delivery date and that no claim is made of an agreement for the extension of credit. Ex Parte 73 forbids the extension of credit — not an agreement for the extension of credit. The complaints assert that the railroads "frequently and knowingly engaged in the praeticee of extending credit in excess of 120 hours" and "did extend credit" for more than that period. The allegations are sufficient to state a claim for the forfeitures. Any defenses which the railroads may have must be developed at the trials on the merits. We express no opinion whether inability to collect equates with extension of credit. This may depend on the facts developed at the trials.

Reversed and remanded for further proceedings consistent with this opinion.

Appendix B-1

In the United States District Court

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Defendant.

No. C 223-65

MEMORANDUM DECISION

For the reasons stated in my ruling in C 221-65, *United States of America* v. *Western Pacific Railroad Company,* dated December 27, 1965, and filed December 28, 1965, defendant's motion to dismiss the complaint in the above entitled action is hereby granted.

The case cited by the government during the oral argument in the Western Pacific Railroad Company case in support of its contention that violation of the statute in question, with or without the change of authorized credit terms by regulation, would give rise to the penalty, does not seem to the court to sustain the government's position. *United States* v. *St. Regis Paper Company,* 285 F.2d 607 (2d Cir. 1960). See also 181 Fed. Supp. 862. On the contrary, this case suggests to me that there would be serious problems of due process were I to hold here that without an administrative order directed specifically to the complained con-

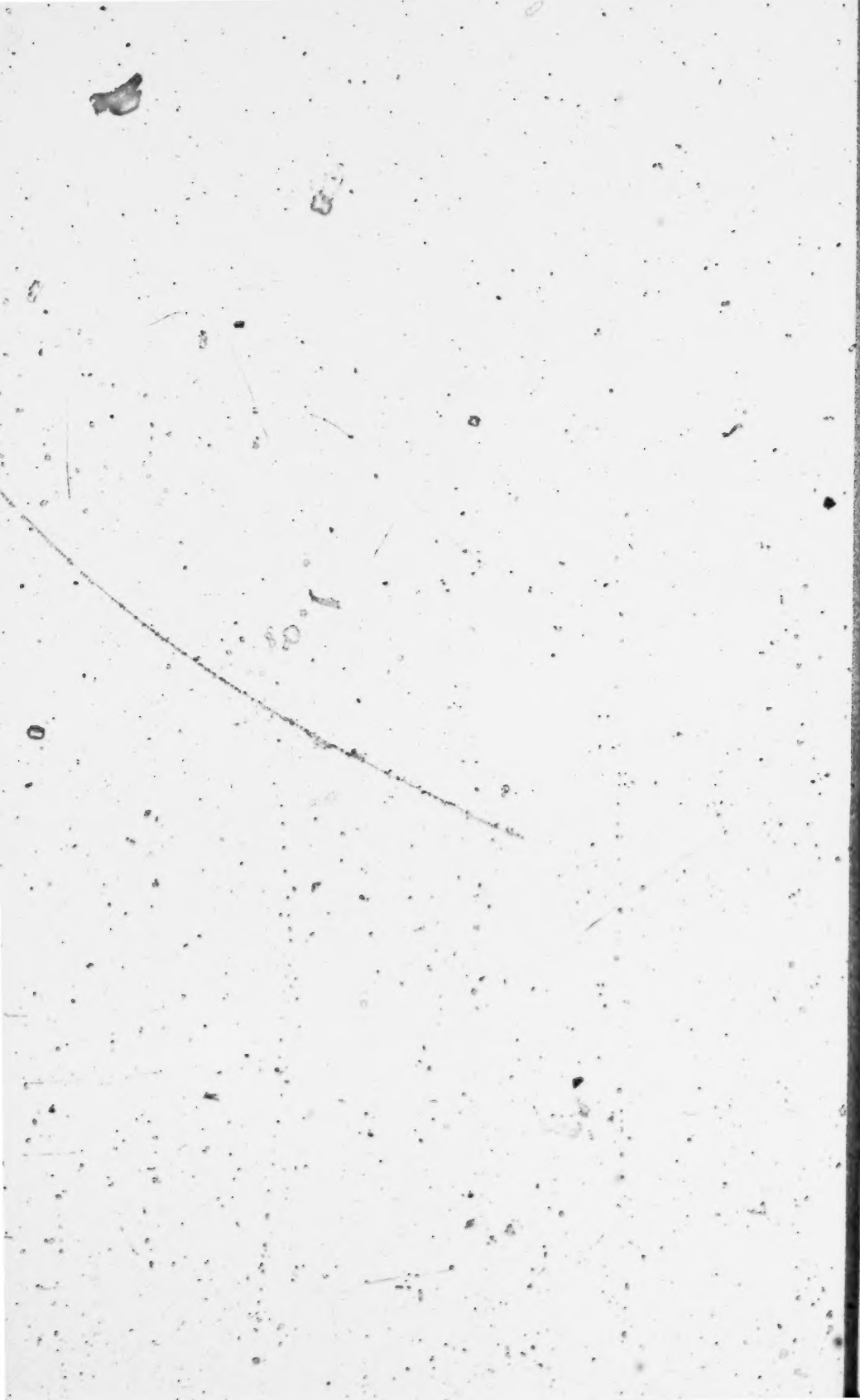
duct and an opportunity to be heard thereon, the defendant in this proceeding would be liable for the forfeiture in question.

The motion to dismiss the complaint is granted, and the government is allowed twenty days within which to file an amended complaint if it be so advised.

Dated this 28th day of December, 1965.

s/ A. SHERMAN CHRISTENSEN
A. Sherman Christensen
United States District Judge

Appendix B-2



Appendix B-2

In the United States District Court

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY,

Defendant.

No. C 221-65

MEMORANDUM DECISION

The complaint in this case is in three counts and seeks to recover penalties of $5,000.00 with reference to each of these counts for violation of an alleged order of the Interstate Commerce Commission relating to the collection by the carrier of freight charges. 49 United States Code 16(8).

It is provided by statute that no carrier by railroad shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. 49 United States Code § 3.

Regulations adopted by the Commission pursuant to this statutory authority are designated as Ex Parte No. 73. They now limit the credit period to 120 hours computed from midnight of the day of delivery or date of presen-

tation of the freight bill, whichever is later, excluding Saturdays, Sundays and legal holidays. 49 C.F.R. 142.1b, 142.6, 142.7, 142.8, 142.9, 142.10, and 142.11.

The complaint alleges that the defendant frequently and knowingly engaged in the practice of extending credit in excess of 120 hours for tariff charges applicable to interstate carload shipments of freight to certain interstate shippers at Salt Lake City, Utah; and alleges more particularly in each count that defendant delivered to and relinquished possession of a carload shipment and presented its freight bill within the requisite time, but failed to collect the charges within the 120 hours, and failed thereafter to put the shipper on a cash basis or refuse to extend credit to it. On each count the statutory forfeiture of $5,000.00 is claimed.

I am of the opinion that Ex Parte Order No. 73 is not such an order as is contemplated by Section 16 of Title 49, United States Code, and that the alleged conduct of the defendant does not constitute a knowing failure to obey any order of the Interstate Commerce Commission. Ex Parte No. 73 is not the type of "order" contemplated by 49 United States Code 16(8). Ex Parte No. 73 is legislative in character and has the same force and effect as it would have if enacted by Congress. It is in effect a general modification of Section 3 of Title 49 which prohibits the surrender of freight without first collecting the freight charges.

If there had not been such a modification of Section 3 and Section 3 stood simply as an unregulated statute prohibiting the surrender of freight without the prior collection of freight charges, it seems clear that its violation would not have been a failure or neglect "to obey any or-

der made under the provisions of Section 3. . . .'' Section 3, as the credit terms are modified from cash to 120 hour terms by Ex Parte No. 73, continues essentially of the same character. A violation of that statute, notwithstanding its changed effect, bears the same consequences as it would intially. Ex Parte Order No. 73, while authorized by Section 3 of the statute, and regularly adopted after notice by the Commission, is a general regulation and not such an order as is contemplated by 49 United States Code § 16(8).

Defendant's motion to dismiss the complaint is granted and the plaintiff is allowed twenty days to amend if it be so advised.

Dated this 27th day of December, 1965.

s/ A. SHERMAN CHRISTENSEN
A. Sherman Christensen
United States District Judge

Appendix C

Interstate Commerce Act

Section 3(2)

§ 3, par. (2). Payment of freight as prerequisite to delivery. No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided;* That the provisions of this paragraph shall not be construed to prohibit any carrier or express company from extending credit in connection with rates and charges on freight or express shipments transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading,

has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this title or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within the period provided in paragraph (3) of section 16 of this title. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this title or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16 of this title. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges, and an action for the enforcement of his liability may be begun

within the same period provided in the case of an action against a consignee who has given erroneous information as to the beneficial owner. Feb. 4, 1887, c. 104, Pt. I, § 3, 24 Stat. 380; Feb. 28, 1920, c. 91, § 405, 41 Stat. 479; Mar. 4, 1927, c. 510, § 1, 44 Stat. 1447; Sept. 18, 1940, c. 722, Title I, § 5(d), 54 Stat. 902; Aug. 2, 1949, c. 379, § 2, 63 Stat. 485.

Interstate Commerce Act

Section 10(1)

(1) Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: *Provided*, That if the offense for which any person shall be convicted

as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Interstate Commerce Act

Section 16

§ 16. Orders of commission and enforcement thereof

Award of damages

(1) If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Proceedings in courts to enforce orders; costs; attorney's fee

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises.

Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonabe attorney's fee, to be taxed and collected as a part of the costs of the suit.

Limitation of actions

(3) (a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) of this paragraph or of the two-year period of limitation in subdivision (c) of this paragraph a carrier subject to this chapter begins action under subdivision (a) of this paragraph for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

(h) The provsions of this paragraph shall extend to and embrace cases in which the cause of action accrued prior to June 7, 1924, as well as cases in which the cause of action accrues thereafter, except that actions at law begun or complaints filed with the commission against carriers subject to this chapter for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) of this paragraph if such actions shall have

been begun or complaints filed prior to June 7, 1924, or within six months thereafter.

Joinder of parties; process; judgment

(4) In such suits all parties in whose favor the commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Service of orders of commission and notices of proceedings

(5) Every order of the commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law. In proceedings before the Commission involving the lawfulness of rates, fares, charges, classifications, or practices, service of notice upon an attorney in fact of a carrier who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier, except where the carrier has designated an agent in the city of Washington, District of Columbia, upon whom service of notices and processes may be made, as

provided in section 50 of this title: *Provided,* That in such proceedings service of notice of the suspension of a tariff or schedule upon an attorney in fact of a carrier who has filed said tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier, and service of notice of the suspension of a joint tariff or schedule upon a carrier which has filed said joint tariff or schedule to which another carrier is a party shall be deemed to be due and sufficient notice upon the several carriers parties thereto. Such service of notice may be made by mail to such attorney in fact or carrier at the address shown in the tariff or schedule.

Suspension or modification of orders

(6) The commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Compliance with orders

(7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Failure of carrier or officer to obey orders; penalty

(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Suit for recovery of forfeiture

(9) The forfeiture provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

District attorneys to prosecute for forfeitures; costs and expenses

(10) It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to proseceute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Employment of attorneys by commission

(11) The commission may employ such attorneys as it finds necessary for proper legal aid and service of the commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the commission's own instance or upon complaint, or to appear for or represent the commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the commission.

Proceedings to enforce orders other than for payment of money

(12) If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of

the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Copies of schedules, tariffs, contracts, etc., kept as public records; evidence

(13) The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this chapter shall be preserved as public records in the custody of the secretary of the commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals. Feb. 4, 1887, c. 104, Pt. I, § 16, 24 Stat. 384; Mar. 2, 1889, c. 382, § 5, 25 Stat. 859; June 29, 1906, c. 3591, § 5, 34 Stat. 590; June 18, 1910, c. 309, § 13, 36 Stat. 554; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Oct. 22, 1913, c. 32, 38 Stat. 219; Feb. 28, 1920, c. 91, §§ 423-429, 41 Stat. 491, 492; June 7, 1924, c. 325, 43 Stat. 633;

Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 11(a), (b), 54 Stat. 912, 913; Aug. 2, 1949, c. 379, § 6, 63 Stat. 486.

Interstate Commerce Act

Section 41(1)

(1) Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be one by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemenor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in chapter 1 of this title or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as

is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprison in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Administrative Procedure Act

Section 551

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or prac-

tice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

* * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

Appendix D

Ex Parte No. 73.

In Re Section 3 of the Interstate Commerce Act, as Amended by Section 405 of the Transportation Act, 1920.

Submitted April 21, 1920. Decided June 4, 1920.

Rules and regulations for the prompt payment of transportation rates and charges prescribed.

Alfred P. Thom for Association of Railway Executives; *S. M. Adsit* for Virginian Railway Company; *James F. Fahnestock* for Pennsylvania Railroad Company; *Arthur B. Jones* for Chicago & North Western Railway Company; *J. L. Harris* for Chicago & Alton Railroad Company; *H. W. Meyers* and *T. J. Norton* for Atchison, Topeka & Santa Fe Railway Company; *Wm. N. Neff* and *J. S. Livengood* for Southwestern Railroad Executives Association; *Edward L. Rossiter* for New York Central Railroad Company; *T. J. Smith* and *Francis B. James* for Campbells Creek Railway Company; and *Henry Thurtell* for Southern Railway.

R. C. Allen, W. W. White, and *S. E. Bool* for Lake Superior Iron Ore Association; *E. S. Ballard* for National Coal Association and Rubber Association of America; *A. E. Beck* for Merchants & Manufacturers Association of Baltimore; *Joseph H. Beek* for St. Paul Association of Public & Business Affairs; *Charles S. Belsterling* for Carnegie Steel Company, National Tube Company, American Sheet & Tin Plate Company, American Bridge Company, American Steel & Wire Company, Tennessee Coal & Iron Company, Lorain Steel Company, Illinois Steel Company, Universal Portland Cement Company, Oliver Iron Mining Company,

H. C. Frick Coke Company, and others; *B. L. Benfer* for Benfer Company, National Macaroni Manufacturers Association, Foundry Supply Manufacturers Association, Cleveland Macaroni Company, Bishop & Babcock Company, Galion Iron Works & Manufacturing Company, and others; *J. S. Brown* for Board of Trade of the City of Chicago; *J. B. Campbell* for Spokane Merchants Association and Spokane Chamber of Commerce; *W. H. Chandler* for Boston Chamber of Commerce, Massachusetts Associated Industries, Massachusetts Chamber of Commerce, Arkwright Club, New England Traffic League, and Boston Wool Trade Association; *R. Cumming* for American Fruit & Vegetable Shippers Association; *Fayette B. Dow* for National Petroleum Association, Western Petroleum Refiners Association, Rochester Chamber of Commerce, National League of Commission Merchants of the United States, International Apple Shippers Association, and Western Fruit Jobbers Association of America; *G. M. Freer* for National Industrial Traffic League; *B. L. Glover* for Ash Grove Lime & Portland Cement Company; *Mr. Graham* for Southern Traffic League; *F. H. Harwood* for Illinois Coal Traffic Bureau; *C. B. Heinemann* for National Live Stock Exchange; *Percival Johnson* for Pulaski Iron Company; *Warren C. King* for Manufacturers Council of New Jersey; *B. A. Kozicke* for National Wholesale Grocers Association of the United States; *George C. Lucas* for Shippers Conference Committee of Greater New York and American Tobacco Company; *W. W. Manker* for Armour & Company and subsidiary companies; *D. O. Moore* for Chamber of Commerce of Pittsburgh; *Herman Mueller* for Milwaukee Association of Commerce, Sheboygan Association of Commerce, Cheese Shippers Traffic Association, Wisconsin Retail Lumbermen's Association, and others; *E. H. Porter*

for Commercial Traffic Managers and Atlantic Refining Company; *R. W. Potect* for New England Traffic League and Stanley Works; *J. T. Preston* for Association of Commerce of Roanoke, Va.; *R. D. Rhodehouse* for Youngstown Chamber of Commerce and Ohio State Industrial Traffic League; *George A. Schroeder* for Milwaukee Chamber of Commerce; *Wm. D. Smith* for Wm. Wrigley, jr., Company and Shippers Conference Committee of Greater New York; *Joseph N. Teal* for Pacific coast cities; *D. W. Thomas* for Virginia Iron, Coal & Coke Company; *Herbert Thompson* for Compressed Gas Manufacturers Association, Union Carbide Company, and National Carbon Company; *John I. Tierney* for Manufacturing Chemists Association of the United States; *George H. Tower* for Standard Oil Company of New Jersey; *Jonas Waffle* for Indiana Coal Operators; *Luther M. Walter* for Jones & Laughlin Steel Company and Morris & Company; *D. T. Waring* for Central Leather Company and Shippers Conference Committee of Greater New York; *George B. Webster* for Associated Cooperage Industries of America; *S. J. Wettrick* for Seattle Chamber of Commerce and Commercial Club; *J. W. White* for National Fertilizer Association; and *Nathan B. Williams* for National Association of Manufacturers.

T. B. Harrison for American Railway Express Company.

R. G. Hare for Prairie Pipe Line Company.

BY THE COMMISSION:

Section 3 of the interstate commerce act provides in paragraph (2) that:

> From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

On March 30, 1920, we gave notice that we would hear shippers, carriers, and other parties interested in this subject previous to issuing the rules and regulations contemplated by the statute. At a hearing on April 20 and 21, 1920, we heard many shippers, certain organizations of shippers, and the principal carriers, concerning the rules and regulations which should be promulgated.

General Order No. 25, issued by the Director General of Railroads, among other things, provided:

> Effective July 1, 1918 [subsequently changed to August 1, 1918], the collection of transportation charges, by carriers under Federal control, for services rendered, shall be on a cash basis, and, effective as of that date, credit accommodations then in existence which may be in conflict with the following regulations shall be cancelled.

In cases where the enforcement of this rule, with respect to freight, will retard prompt forwarding or delivery of the freight or the prompt release of equipment or station facilities, carriers will be permitted to extend credit for a period of not exceeding forty-eight (48) hours after receipt for shipment of a consignment if it be prepaid, or after delivery at desetination if it be a collect consignment, provided the consignor if it be a prepaid consignment, or the consignee if it be collect, file a surety bond either individual or corporate, in an amount satisfactory to the Treasurer of the carrier.

Circular No. 9, dated June 29, 1918, issued by the director of public service and accounting, in the United States Railroad Administration, provided in part as follows:

While the carrier must protect itself in cases where such protection is necessary, it should also treat shippers or consignees in a business way. The majority of shippers or consignees in the past have paid their freight when they received their goods and that practice should be continued for the future. In many instances with regular customers there is no necessary connection between the delivery of freight and the presentation and payment of the freight bill; that is, the freight will be delivered to one person at one time and the bill presented to and collected from some other person at some other time. It is not the intent of this order to interrupt reasonable arrangements of that sort which do not involve the granting of a period of credit, but simply to put the transaction upon a cash basis.

Assume, for example, that freight is delivered to such regular customer on Monday and that the freight bill is mailed or delivered on the same day to the shipper or consignee being received by him in due course upon the morning of the next day. If, now, the shipper or consignee remits his check for the amount during Tuesday so that it may be received by the carrier the morning of Wednesday, that is to be treated as a cash

transaction. The bill is presented and paid in due course of business and no period of credit in the ordinary acceptation of that term is given.

This might in fact allow one day for the examination and correction of the freight bill but that would not be the purpose of the transaction. In such case no bond will be required.

If in a particular case it is in the opinion of the carrier necessary or in the interest of economy that a period of two days in addition to the above prescribed should be allowed, this may be done upon the filing of the necessary bond. The check in this case should be mailed or payment made on Thursday.

The carriers have estimated that the enforcement of General Order No. 25 provides them with working capital of approximately $75,000,000 which, if the customs and practices in the extension of credit to shippers in vogue prior to the enforcement of that order were restored, would generally be outstanding as unpaid transportation charges.

The carriers ask that the rules and regulations to be promulgated shall follow, as nearly as is practicable, the provisions of General Order No. 25 and the circular mentioned above. A large number of the shippers have joined in a request that the rules and regulations shall provide that in certain cases and upon surety bonds being furnished by the shippers, the carriers shall render freight bills daily, and periodical statements of the bills on the 7th, 14th, 21st, and last day of each month, and that the shippers shall pay the bills within three days after receiving the statements. The shippers and the carriers have acknowledged that a large proportion of the shippers do not need, and will not ask for, credit, and that such credit is necessary only in connection with forwarding or delivery for those whose

shipments are extensive or in connection with shipments received or delivered by the carriers under circumstances hereinafter described. The maximum period of credit suggested by the carriers as proper and necessary is 96 hours, and the period asked by many of the shippers is that of weekly settlement as described above. A few of the shippers, including the Lake Superior Iron Ore Association, have asked that the rules and regulations which we promulgate shall permit carriers to resume the practices antedating General Order No. 25—that is, to extend long periods of credit to shippers—but as that practice is now clearly prohibited by the statute further consideration of such requests is unnecessary.

With but few exceptions the shippers have indicated that they do not expect credit for the purpose of financial accommodation in the amount of the transportation charges. The shippers ask that the rules and regulations which we promulgate shall provide for a short period of time between the delivery of the shipments or the rendering of the freight bills and the payment of the transportation charges, the following reasons being representative:

1. Several shippers have asserted that this brief extension of credit is necessary to enable them to audit the freight bills and correct erroneous applications of rates prior to payment of charges incorrectly computed by the carriers.

2. Both shippers and carriers requested that a reasonable time be granted for the computation of transportation charges, the presentation of freight bills, and the collection of charges on shipments, which, in accordance with custom and practice or tariff provisions, are collected upon

destination elevator, cotton compress, official, certified, or other destination or outturn weights, the weighing being customarily done after the delivery of the shipments at destination.

3. Upon certain freight traffic, in accordance with tariff provisions for the computation of transportation charges at outturn weights or values ascertained by consignees, it is not customary for the carriers to make or present to shippers, bills for the transportation charges until after the carriers have relinquished possession of the shipments at destination.

4. Many large shipping corporations are engaged in the operation of mines, the production of lumber, or production of raw materials, and other commodities in sparsely settled districts far removed from banking facilities, where the carriers and shipping corporations do not maintain, and can not reasonably be expected to maintain, office forces entrusted with funds for the settlement of transportation charges. A large tonnage of freight traffic is customarily shipped to and from the operations in such districts. An undue burden would be placed upon industry if rules and regulations should require financially responsible shippers, such as mining companies and other corporations, to station appropriate employees at each of their several mines or operations to pay transportation charges on shipments consigned to such operations. It is not always advisable to entrust or encumber those engaged in trucking freight for shippers with funds for the payment of transportation charges. The foregoing is a sufficient recital of the exigencies described at the hearing.

The carriers assert that the number of erroneous freight bills has not been large, and the rendering of incorrect freight bills is a temporary war-time condition, ascribable to the unusual labor turnover during the past four years, which will soon be remedied. Section 6 of the interstate commerce act provides that no carrier subject to the provisions of that act shall demand, collect, charge, or receive a greater or less or different compensation than is provided in the published tariffs. Section 3, paragraph (2), does not authorize carriers to extend credit to shippers in order that the shippers may have time to audit freight bills and thereby guard against claims for overcharges or undercharges subsequent to payment of the freight bills. We expect the carriers to take action that will substantially reduce the number of erroneous freight bills rendered.

The following is quoted from the report of the House of Representatives of the Committee on Conference upon the Senate and House bills which became the "Transportation Act, 1920":

> Section 405 provides that, after July 1, 1920, no railroad shall relinquish possession of freight at destination until all rates and charges thereon have been paid, except under such rules as the Commission may prescribe to assure prompt payment and prevent unjust discrimination. The latter provision virtually continues the operation of General Order No. 25 of the Railroad Administration, as supplemented, relating to the extension of credits by railroads.

The intention of Congress to require by statute the enforcement of the provisions of General Order No. 25, as supplemented, in so far as they may be reasonably applied, is thus manifest. Those provisions have been in force for 22 months and the business methods of the shippers and

carriers have been adjusted to conform thereto. The rules and regulations which we promulgate should contemplate the collection of transportation charges prior to, or contemporaneous with, the delivery of most shipments, and, while adhering to the principle of prompt payment of charges, should, upon certain freight traffic, give opportunity for the preparation of freight bills at destination, weights to be ascertained after the carriers have relinquished possession of freight, and for the presentation of freight bills to the appropriate offices and employees of shippers by United States mail, by messenger, or by other proper means, and for payment of the charges in the regular course of business by the shippers. An order will be issued in accordance with these conclusions.

In the rules and regulations which we promulgate we will not undertake to deal with several matters which were covered by General Order No. 25. We will not prescribe rules for the collection of prepaid charges on shipments of freight, or for the collection of passenger fares or baggage charges, or for the form or character of surety bonds. We believe that our order will admit of the application to those matters of the provisions of General Order No. 25, as supplemented, or other appropriate rules to be formulated by the carriers, and that we should leave the carriers free to prescribe these and other details in the instructions which we expect that the carriers will issue for the guidance of their agents. We expect that carriers will refrain from granting undue extensions of credit that might arise from the transmission of freight bills, checks, drafts, and money orders through the mails to or from offices of shippers that are located at a considerable distance from the places where the carriers relinquish possession of the freight.

An appropriate order will be entered.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of June, A.D. 1920.

Ex Parte No. 73.

In re Section 3 of the Interstate Commerce Act, as amended by Section 405 of the Transportation Act, 1920.

It appearing, That section 3, paragraph (2), of the interstate commerce act, as amended by section 405 of the transportation act, 1920, provides:

> From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges aind to prevent unjust discrimination: *Provided,* That the provision of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the following rules and regulations be, and they are hereby, prescribed to become effective on July 1, 1920, and to remain in force until the further order of the Commission:

1. Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to insure payment of the tariff charges within the period of credit herein specified, may relinquish possession of the freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons being herein called shippers, for a period of ninety-six hours to be computed as follows:

(A) Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight the ninety-six hours of credit shall run from the first 4:00 p.m., following the delivery of the freight.

(B) Where the freight bill is presented to the shipper subsequent to the time the freight is delivered the ninety-six hours of credit shall run from the first 4:00 p.m., following the presentation of the freight bill.

2. Every such carrier shall present freight bills to shippers not later than the first 4 p.m. following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 4 p.m., fol-

lowing the day upon which sufficient information becomes available to the delivering agent of the carrier.

3. Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

4. Sundays and legal holidays, other than Saturday half holidays, may be excluded from the computation of the period of credit.

5. The mailing by the shipper of valid checks, drafts, or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

Ex Parte No. 73

In Re Section 3 of Interstate Commerce Act as Amended February 28, 1920, and March 4, 1927

Submitted March 6, 1930. Decided January 20, 1931.

Rules and regulations for the prompt payment of transportation rates and charges prescribed in 57 I. C. C. 591, modified.

Alfred P. Thom and *Alfred P. Thom, jr.*, for Association of Railway Executives.

John S. Burchmore, Luther M. Walter, and *Joseph H. Beek* for National Industrial Traffic League; *J. M. Belleville* for Pittsburgh Plate Glass Company; *Ralph A. Bentley* for National Tea Company; *Geo. A. Blair* for Institute of American Meat Packers; *J. A. Brough* for Crane Company; *J. S. Brown* for Board of Trade of City of Chicago; *T. C. Burwell* for A. E. Staley Manufacturing Company; *W. H. Chandler* for Merchants Association of New York; *Geo. E. Clinton* for Sheffield Farms Company, Incorporated, New York Milk Conference Board, and Chamber of Commerce of Borough of Queens; *D. A. Dashiell* for National Fertilizer Association, Incorporated, and F. S. Royster Company; *C. S. Decker* for Borden Company; *Fayette B. Dow, Willis Crane,* and *Harry S. Elkins* for American Petroleum Institute and National Petroleum Association; *W. J. Hammond* for Inland Steel Company; *J. P. Haynes* and *C. E. Hochstedler* for Chicago Association of Commerce; *Harold R. Hendrick* for Cincinnati Chemical Works, Incorporated; *Samuel Herndon* for Cincinnati Chamber of Commerce; *L. G. Hutts* for United Engineering & Foundry Company; *H. Ignatius* for Procter & Gamble Company;

Bernard A. Koziske for National Wholesale Grocers Association of United States; *F. E. Luebbe* for Kruger Grocery & Baking Company; *G. E. Mace* for Trenton Chamber of Commerce and United Clay Mines Corporation; *W. W. Manker* for Armour & Company and subsidiary companies; *J. J. Martin* for Montgomery Ward & Company; *F. H. Overdorf* for Bethlehem Steel Company; *H. H. Perry* for Pillsbury Flour Mills Company; *R. G. Phillips, Fayette B. Dow,* and *Horace Johnes* for Joint Council of International Apple Shippers Association, National League of Commission Merchants of United States, and Western Fruit Jobbers Association of America; *R. I. Pierce* for Manufacturers Association; *E. H. Porter* for Commercial Traffic Managers of Philadelphia, Pa., and Atlantic Refining Company; *Chas. R. Seal* for Baltimore Association of Commerce; *Clare B. Tefft* for Toledo Chamber of Commerce; *Warren H. Wagner* for John Morrell & Company; *Edward W. Warren* for Casket Manufacturers Association of America; *Wm. E. Whelpley* for St. Alworth Company; *L. Z. Whitbeck* for Great Atlantic & Pacific Tea Company; *A. J. Whitman* for American Agricultural Chemical Company; *R. C. Fulbright* and *James J. Shaw* for Anderson Clayton & Company and Houston Compress Company; and *E. S. Wagner* for Millers National Federation.

REPORT OF THE COMMISSION ON FURTHER HEARING

DIVISION 3, COMMISSIONERS AITCHISON, PORTER, AND TATE

AITCHISON, *Commissioner*:

Exceptions were filed by various parties to the report proposed by the examiner and the case was orally argued. Our conclusions differ somewhat from those recommended by him.

The original report, 57 I. C. C. 591, and the order therein entered June 4, 1920, prescribed rules and regulations, hereinafter referred to as rules, for the prompt payment of transportation charges, and fixed 96 hours as the maximum time for which carriers should extend credit. No changes are sought in the modified rules prescribed in 59 I. C. C. 456, as applicable to the payment of demurrage charges on tidewater coal handled by the tidewater coal exchanges at New York, N. Y., Philadelphia, Pa., Baltimore, Md., and Hampton Roads, Va.; in 63 I. C. C. 375, as applicable on export traffic loaded in the vessels from railroad piers; or in 69 I. C. C. 351, on traffic from and to Bartle, Calif., originating at or consigned to certain interior points not served by railroad; and these modified rules will not be further considered.

Section 3, paragraph 2, of the interstate commerce act in effect prior to March 4, 1927, provided:

> From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

On March 4, 1927, section 3, paragraph 2, was amended by the omission of the words "assure prompt payment"

and the substitution therefor of the words "govern the settlement."

It was the clear intendentment of the statute prior to its amendment that the carriers' business should be conducted on a cash basis. To assure this purpose they were prohibited from relinquishing their lien on freight transport until all charges thereon had been paid, except under such rules as we prescribed to assure prompt payment of such charges. The statute, as interpreted by us, did not authorize us to prescribe rules permitting the carriers to extend credit to shippers in order that shippers might audit their freight bills and thereby guard against claims for overcharges or undercharges.

The only change in the law made by the amendment is that now we are not restricted to making rules that assure prompt payment of freight charges. We may permit carriers to extend credit for a reasonable time to shippers for the purpose of auditing freight bills or to meet other exigencies of business, but we can not make a mandatory order prescribing a period of credit which carriers must allow. It is within the discretion of the carriers to refuse to extend any credit or to extend credit for a shorter period than the maximum prescribed by us.

The proceeding was reopened for further hearing on a petition filed by the National Industrial Traffic League, hereinafter referred to as the League, alleging that the present rules are unworkable and that there are numerous unavoidable violations thereof by both carriers and shippers. It asks that the rules be modified so as to allow shippers a longer period of time within which to pay freight charges. The Association of Railway Executives denied

the League's allegations and asks that the request be refused. A number of individual shippers and firms appeared at the hearing in support of both parties. As a matter of convenience the parties advocating a change in the present rules will hereinafter be referred to collectively as petitioners.

Each carrier has formulated its own rules governing the extension of credit to its patrons. Therefore, the practices are not uniform. Generally, the carriers appear to have established two periods for the collection of transportation charges, one of 48 hours and one of 96 hours, but all carriers do not require that the same conditions precedent exist before granting credit for such periods. Some of the carriers refuse to grant 48 hours' credit unless the retention of possession of freight by them will actually retard prompt delivery or prompt release of equipment or station facilities, while others grant 48 hours to any responsible patron on the theory that to refuse to grant credit would seriously interfere with the orderly administration of the carriers' business. The second class of carriers referred to make no distinction between shippers based on the volume of movement or condition of facilities. The occasional shipper is granted the same privileges as those having a heavy volume of traffic. The general rule seems to be that carriers grant 48 hours' credit to any and all shippers requesting such accommodation, provided they are deemed to be financially responsible. Some carriers require a bond of patrons on the 48-hour list, while others do not; but the general rule is that a patron whose credit rating is satisfactory is not required to give a bond. The practices of the carriers in granting the 96-hour period vary more widely, but the majority adhere more strictly

to the rules. Generally, credit for 96 hours is not allowed unless investigation shows that the granting thereof is necessary to prevent retardment of prompt delivery or that it will promote prompt release of equipment or station facilities. When investigation does not convince the carriers that the granting of credit for 96 hours will be advantageous to them, some of them refuse to grant more than 48 hours. Others try to convince the applicant that credit for 48 hours will serve his purpose, but if the shipper insists, they grant credit for 96 hours. Other carriers grant credit for 96 hours on a showing that the applicant's methods of conducting business would be interfered with if his application were denied. The general rule seems to be that the granting of credit for 96 hours is discouraged, and that bond is required, although there are some exceptions, some carriers being more liberal than others in both particulars.

Reports made by treasurers of 136 Class I railroads and large terminal and switching roads, which produced 98.4 per cent of the aggregate operating revenues of all such roads in 1928, show that 10 per cent of the 1928 freight revenue was collected at the time of delivery of inbound freight or forwarding of prepaid shipments, 72.9 per cent from patrons on the 48-hour list, and 16.7 per cent from patrons on the 96-hour list. The fact that the number of patrons on the 48-hour list is so greatly in excess of those on the 96-hour list is due not only to reluctance on the part of the carriers to grant 96 hours' credit, but to a large extent to the refusal of shippers to give bond. Some of the large business interests, which contend that the present maximum period of 96 hours is too short, are among those who have failed to avail themselves of the 96-hour period

because they refuse to give bond. Certain of them state that if a longer period of credit is permitted, they will continue to operate under the 48-hour period if a bond is required to obtain the benefit of the longer period.

Petitioners generally advocate an extension of the credit period for a maximum period of seven or eight days. They have not proposed any specific changes in the present regulations for the purpose of meeting what they say are the reasonable demands of business, except as to the payment of undercharges and certain accessorial charges hereinafter discussed. The carriers purpose that the hour of 4 p.m. in the present rules be changed so as to allow the presentation or mailing of freight bills at any time prior to midnight.

Petitioners generally say that they do not desire credit as a matter of financial accommodation. Three primary reasons why they believe they should have an extension of time within which to pay freight charges are shown below:

1. Sufficient time should be allowed for the checking of the correctness of the bills rendered as to the weights applied, the rates, extensions, and charges.

2. Reasonable time should be allowed for determination of the receipt of the goods by the consignee of whom payment is demanded, the condition of the goods, and that the goods were in fact consigned to or intended for such consignee.

3. Sufficient time should be permitted to avoid unreasonable and extraordinary expense to consignees and consignors for clerical hire in the matter of auditing, check-

ing, and vouchering of the bills, including the avoidance of unnecessary expense of numerous checks in payment of bills.

The evidence is convincing that when freight bills are properly rendered and the handling thereof is given preferred and expedited attention, it is practicable for most shippers whose offices are located near the point of delivery to determine whether the goods have been delivered, whether the freight bill covers traffic belonging to the consignee, and to check and pay the freight bills within 48 hours. There are few instances under such circumstances where 96 hours is not ample for the purposes stated.

Many commercial organizations have agencies or branches more or less widely scattered over the country and do not maintain office forces for the auditing and payment of freight bills at such points. Such work is performed at branch or central offices. In many instances, bills for freight delivered at such agencies can not be forwarded by mail, audited, and paid within the credit period allowed such concerns. Payment under the present practice can be and frequently is made by drafts drawn on the shipper by the carrier's or shipper's agent.

The fact that the handling of freight bills must be given expedited attention in order to pay them within the time allowed is one of the principal causes of complaint. Petitioners desire time to pass the freight bills through their traffic, accounting, treasury, and other departments in the ordinary course of business. They state that if they are permitted to handle freight charges in this manner, and are allowed seven or eight days within which to pay, they can reduce the number of necessary checks now drawn,

the amount of bookkeeping and clerical hire, and detect overcharges and undercharges, before payment of the bills. They assert that extension of the credit period would relieve them from the pressure they are now under in attempting to pay bills within the credit period and at the same time conform to their present operating systems; and that it would also reduce the number of failures to comply with the present regulations, thereby eliminating many petty annoyances caused by the carriers' insistence that they comply with the law. Reasons given as justifying an extension of the credit period other than those mentioned above are that shippers should be allowed to pay freight bills at their convenience; that they should be allowed to accumulate freight bills and pay them by one or two checks once or twice a week; and that they should be allowed sufficient time to check goods against the invoice and contact of sale in order to verify the terms of sale and the quantity, quality, and weight of the goods, and to examine the goods to determine whether any has been lost or damaged in transit.

The evidence as to the number of erroneous freight bills issued is somewhat contradictory. According to some of the petitioners erroneous freight bills constitute but a small percentage of all the bills rendered, while others state that there has been but little improvement in the rendering of freight bills during the last seven or eight years. One witness estimated that about 40 per cent of the freight bills rendered on his traffic are erroneous. This statement was contradicted by a witness for the carriers who caused an investigation to be made at three of the principal cities where a large proportion of the traffic referred to by the witness is handled. Replies received from 1,746 agents,

representing 151 railroads, show that during November, 1928, they issued 7,526,825 freight bills of which 116,287, or about 1.5 per cent, contained errors. The treasurer of the Erie stated that its experience demonstrates that more than 96 per cent of the freight bills issued by it are correct when rendered; and that a recent check for one month showed that 99 per cent were correct when rendered. The comptroller for the Northern Pacific showed that during 1920 and 1928, refunds of overcharges amounted to 0.828 per cent and 0.353 per cent, respectively, of the total freight revenues, and that the undercharges collected for the same years were 0.277 and 0.175 per cent, respectively, of such total revenue.

Although some of the errors in freight bills are directly chargeable to consignors because of errors in billing, such as use of erroneous weights and descriptions of traffic, and the showing on a percentage basis as to particular carriers is good, the evidence as a whole shows that as to the traffic of many shippers there is much room for improvement in the rendition of freight bills, not only as to the amount of the charges, but as to their legibility and the completeness of the information shown thereon. Certain of the carriers are endeavoring to bring about such improvement. They are auditing freight bills before presentation at the larger stations; and after delivery of the freight and payment of the charges at the smaller stations they are forwarding the bills to the central office for verification. Where such practices are in effect good results have been obtained and overcharges, when discovered, are promptly refunded. Carriers generally will be expected to extend their efforts and take the necessary action to substantially reduce the number of erroneous freight bills and to determine that the

bills when rendered are legible and contain the data specified in *In the Matter of Freight Bills,* 29 I. C. C. 496. The prompt presentation of correct freight bills in proper form will go far towards removing the difficulties many of the petitioners are now encountering in paying their freight bills within the allowed credit period.

Petitioners contend that the present regulations are not being complied with and instance many violations of the act. General intimations unsupported by competent evidence of deliberate violations of the act by agreement between agents of the carriers and shippers were made by a representative of the League, but, on brief, counsel for the League states that it does not say that it is a general practice of the carriers to violate the statute. Petitioners contend that the rules are now so stringent that it is impossible to enforce them and that there are many unavoidable violations. They admit that it is entirely feasible for most shippers to comply with the present rules and that as to such shippers the rules are being enforced. They say that violations are confined principally to concerns with many country branches and isolated plants, such as milk and cheese companies and large concerns receiving or shipping traffic in large quantities at or from large plants of cities, such as steel companies, meat packers, and large manufacturers. Although violations caused by loss or misplacement of freight bills and other errors due to human frailties constitute a large proportion of the total violations, others are clearly due to carriers' and shippers' indifference to the requirements of the law. The following are illustrations of such inexcusable delinquencies. One cheese manufacturer pays its freight bills at Green Bay, Wis., every five days, at Beaver Dam and South Beaver

Dam, Wis., to one carrier once every four days and to another once a week; at Wichita Falls, Tex., it is allowed time to write to its Chicago office and obtain funds whenever a carload of freight is received; and at other places similar conditions are said to exist. Another company fails to pay about 35 per cent of its freight bills within the maximum credit period because of delay caused by checking freight bills and passing them through the several divisions or departments of its organization. A large number of failures to pay within the allowed period are due also to the refusal of shippers to pay freight bills until they are convinced that the amounts of the charges sought to be collected are correct. An analysis of answers to questionnaires received from 250 agents of 13 carriers shows that for the week of March 11 to 16, 1929, 13.1 per cent of the total freight revenues was collected after the expiration of the 48-hour period but before the expiration of the 96-hour period, and 4 per cent after the expiration of the 96-hour period. The reasons assigned by delinquents for not paying within the 48-hour period were in the order of the number of replies received giving each reason as follows, party who signs checks out of town, sick, etc.; general business routine, or rush of business, delays payment; bills mislaid or lost, neglect, or oversight; bills not received or delayed in the mail; bills forwarded to out-of-town headquarters for payment or approval; question of error in rate, weight, etc.; sickness or vacation in office force; shortage of funds due to slow collections; and cars not placed.

There is a demand by a large number of shippers for an extension of the credit period. The only active opposition to such an extension is on the part of the railroads

and the growers and shippers of fresh fruit and vegetables. While not actively opposing the extension of the credit period a considerable number of shippers find the present rules practicable and satisfactory and do not advocate any change therein. The League sent questionnaires to approximately 960 members inquiring whether they were satisfied with the present rules. A large number of shippers whose views were solicited by the League failed to answer questionnaires sent to them. It received replies from 300 members, 233 of whom desired an extension of time and 67 of whom are satisfied with the present rules, or were indifferent as to whether they are changed. Among the 67 expressing no desire for a change are some of the largest shippers in the country and four chambers of commerce. The return from questionnaires sent to the railroad agents shows that out of 910 agents having patrons on the 96-hour list, 752 reported that they had not received any complaints against the present rules, while 152 reported that they had received complaints and that the reasons assigned by the shippers complaining or desiring an extension of time were in the order of the number of replies containing each such reason as follows, time too short for checking rates, weights, etc. or errors in rates, weight, etc.; bill forwarded to out-of-town headquarters for payment or approval; general business routine or rush of business; desire to devote only one day each week to bookkeeping and paying freight bills; and shortage of funds due to slow collections.

The law requires that charges for the transportation of freight must be paid within the credit period allowed by the regulations. The desire of shippers to adhere to convenient and established methods of conducting their

business and to postpone payment pending disputes as to the legal charges is no excuse for the failure to comply with the law. Deviations by shippers from the terms of the statute and the regulations made pursuant thereto are no more to be countenanced than are such acts on the part of the carriers.

Ten railroad treasurers who are charged with the administration of the carriers' credit rules testified that they had received but few complaints in regard to the present rules and regulations; that there is no widespread demand for a change in the rules; that, so far as they have been able to ascertain, the rules are satisfactory to the large majority of shippers; and that the rules are not only workable but that they are being strictly enforced. They state a check is kept on the station agents through the traveling auditors; that from time to time the agents' attention is called to the rules and they are directed to see that they are enforced; that a check is kept on outstanding bills and that attention is promptly called to delinquencies; and that if patrons fail to pay after such notice or persist in not paying within the credit period, their names are dropped from the credit list.

The treasurers' testimony relative to the workability and enforcement of the regulations is apparently confined to the transportation charges, exclusive of accessorial charges, within 96 hours, as they had little knowledge relative to the collection of accessorial charges. The record shows that at St. Louis, Mo., and other cities a patron on the 48-hour list who fails to pay within that time, but pays within 96 hours, is not denied further credit; and that some carriers are ignoring the fact that the granting of credit

under the rules is contingent on whether the retention of possession will retard prompt delivery or prompt release of equipment or station facilities.

The treasurers are endeavoring to comply with the law as interpreted by them, but we are convinced by the testimony of the traffic witnesses, who instanced specific violations such as the periodical payments heretofore referred to and delays for as much as six days in rendering freight bills, and by the prosecutions for failure to comply with the rules and facts disclosed by the investigations by our employees, of which we must take judicial notice, that they are not receiving the necessary cooperation from other employees of the carriers. A material and immediate improvement in this regard will be expected.

The carriers contend that the extension of the credit period would be detrimental to them. They fear if they are clothed with the power to grant credit for a period longer than 96 hours that such power may be used by some of the carriers in an endeavor to obtain competitive traffic from other carriers and that it would result in discrimination between shippers. They testify that a longer period would increase the number of the applications for credit, and because of the larger amounts involved require the exercise of more care and precautions in investigating the financial responsibility of applicants; that more, if not all, shippers would be required to give bond; and that the bonds would have to be for larger amounts resulting in dissatisfaction among shippers and contention between shippers and carriers. They also state that an extension of the credit period would cause more work for the credit officers probably necessitating an increase in their office forces, and would cause

more work and additional expense in the accounting departments and at the larger stations. They state that their experience prior to Federal control demonstrates that it is the general practice of debtors to take advantage of the maximum period of credit allowed, and that the larger the amount due the harder it is to collect. Under such circumstances, they assert that they will more frequently encounter the pleas that funds are short and that because of the rush of business shippers are unable to devote the time necessary to the handling of freight matters. They take issue with the petitioners' contention that an extension of the credit period would tend largely to prevent violations of the law, and predict that it would have the opposite tendency; and contend that their losses due to failure in business of shippers would be materially increased.

The carriers estimate that additional working capital ranging in amount from $34,000,00 to $87,042,146 would be required if the maximum credit period were extended to 192 hours. They estimate that $34,000,000 additional working capital would be required if all patrons now on the 48-hour list were granted 96 hours' credit and all patrons on the 96-hour list were granted 192 hours' credit; that an additional working capital of $80,394,170 would be required if all patrons now on the 48-hour and 96-hour lists were granted 192 hours' credit; and that additional working capital of $87,042,146 would required if half the patrons now paying cash on delivery and all patrons on the 48-hour and 96-hour lists were granted 192 hours' credit.

The carriers point out that they are required to render freight bills promptly, and that no charge is sought in this requirement; but that on the contrary most of the peti-

tioners are demanding that this requirement be more strictly complied with. There is no reason to believe that the extension of the credit period would reduce the number of erroneous freight bills rendered by the carriers.

In addition to the extension of the credit period for the payment of transportation charges, certain of the parties ask us for an expression as to whether the statute and rules apply to the payment of undercharges. An erroneous freight bill rendered by the carrier does not change the carrier's obligation to collect or the shipper's to pay the legal rate. The rules prescribed by us provide that the credit period shall begin to run from the first 4 p.m. following delivery of the freight or the presentation of the freight bill. Therefore, the carriers required that undercharges be paid within the credit period allowed the shipper not exceeding 96 hours after the first 4 p.m. following the presentation of the freight bill for the undercharges. Some carriers have erroneously interpreted the rules as not being applicable to undercharges. The prescription of a credit period of 30 days for the collection of such charges is requested by petitioners and carriers. The transaction is past and in many cases the facts necessary to determine the applicable charges are more difficult to ascertain than those relative to current transactions. As the shipper in the first instance paid the charges demanded by the carrier, it would appear that when further charges are demanded he should be allowed a reasonable time to ascertain the facts and determine whether the additional amount sought is actually due. Thirty days is a reasonable period for these purposes.

The carriers generally do not appear to be collecting certain so-called accessorial charges in accordance with the

rules and we are asked to provide special rules to meet the specific conditions surrounding and attending such services.

In instances where icing charges are to be paid by the consignor on prepaid shipments, it has been the practice of the carriers for a number of years to collect such charges monthly, and business has adjusted itself to this practice. In such instances the icing charges are not known at the time the freight charges are paid or until the car arrives at destination as they are usually based on the amount of ice placed in the cars not only at the origin but also en route. The quantity of ice required for proper refrigeration varies with the length of the hauls, the time consumed in the movement, and weather conditions. In instances where the freight charges are collected from the consignee and where the icing charges are fixed by the tariffs irrespective of the amount of ice used, they are collected at the same time the freight charges are collected.

The tariffs of the carriers contain rules providing for the making of so-called average demurrage agreements, which usually provide for the set off of credits against debits accruing during a stated period, usually one month. Credits are allowed for the release of cars prior to, and debits are charged for the detention of cars beyond, the free-time. The amounts due under these agreements can not be determined until after the period has expired. Their use has had our approval. The carriers state that they require considerable additional time after the expiration of the demurrage period to enable them to check and present the bills. They also state that for various reasons more than the ordinary number of errors occur in these

bills and that shippers are entitled to a longer period of credit in order that they may verify them.

The carriers have submitted drafts of rules which have the approval of the League and two or more shippers, and ask us to approve such rules governing the payment of icing charges and demurrage payable under average agreements. The rules prescribed herein comply substantially with these requests. The League asks that a further special rule be prescribed permitting bills for all demurrage charges where no average agreement is in force to be rendered within 15 days after the end of the month in which they accrue and that shippers be allowed 15 days after presentation of the bills within which to make payment. Such a rule is not acceptable to the carriers and no evidence has been introduced tending to justify its approval.

The carriers, the League, and one or two shippers seek to have us approve the following recommended rule for the payment of charges for switching services not connected with a line haul:

> Bills for switching charges for switching not connected with line haul movement shall be presented within fifteen days following the month in which the charges accrued and shall be paid on or before the last day of the month in which such bills are presented.

The carriers state that there is no surrender of traffic which is security for the freight charges; that the number of such services is few; and that the amount of money involved is comparatively small. No facts are shown tending to support any of these statements and we question their correctness. It is a matter of general knowledge that an

enormous tonnage of many kinds of traffic is handled at the large cities and industrial centers in switching movements which are not parts of line hauls.

Petitioners show that at the large industrial plants the switching services in some instances are covered by line-haul rates; that in others they are due to the carrier's failure to properly place cars; and that in others the switching movements are separated and distinct from line hauls and additional charges are applicable therefor. They say that it is practically impossible for the carriers to render bills on other than a monthly basis due to the large volume of traffic; and that the bills when rendered are far from accurate as the traffic is handled by switching crews, presumably on switch tickets necessitating a subsequent check by the office force to determine on what cars switching charges are applicable. Carriers are now rendering bills for these services on a monthly basis to some of the larger industries and apparently also to some of the smaller shippers. No evidence was introduced showing the extent to which this practice is now followed or by what test the carriers determine when they will follow it. It may be that difficult conditions encountered at some of the large plants would make it more economical and advantageous to both shippers and carriers to collect the switching charges on a monthly basis, but there is no justification for exempting all traffic which receives a switching movement not connected with a line haul from application of the general rules. The evidence is not sufficiently comprehensive to enable us to determine to what extent, if any, the general rules should be modified to meet the situation sought to be covered by the suggested rule.

The question presented, in so far as it relates to the modification of the general rules, is whether, in view of the strenuous objection by the carriers, and their contentions, which are supported by the evidence, that the present rules are workable and enforceable, just to both shippers and carriers, that they assist the carriers in avoiding discrimination between shippers and in the collection of freight charges and reduce to a minimum losses due to failures to pay, and the further facts that the extension of the credit period would require a large additional working capital and cause the carriers additional work and expenses without compensating advantages, we should modify the present rules so as to clothe the carriers with a permissive authority which they claim would work to their detriment.

We have no authority to issue an order requiring carriers to grant any credit. It is their right and privilege not only to demand payment of the freight charges before relinquishing possession of the freight at destination, but to demand the payment of such charges before forwarding the freight from the point of origin. This limitation on our power is recognized by petitioners, but they contend that irrespective of the desires of the carriers it is our duty to prescribe rules that meet the reasonable desire and business practices of shippers. They argue that when the carriers are requested or pressed to grant credit for longer periods than are prescribed by the rules they declare they are unable to do so because of the provisions of the statute. It is sought to deprive them of this defense against the demands of the shippers.

The statute, as amended, gives us an additional freedom of action and enables us to prescribe rules permitting

carriers to depart from the cash basis for reasons which, prior to the amendment, would not have justified such action. We do not interpret the amended statute, however, as justifying us in giving preference to commercial interests over the rights and desires of the carriers, and we do not feel justified in prescribing rules clothing the carriers with a permissive authority they do not desire and which may subject them to threatened or actual diversion of traffic and result in unjust discrimination among shippers.

We find that the rules prescribed by us in the original report, 57 I. C. C. 591, should be modified as follows:

The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as hereinafter set forth.

Where retention of possession of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period herein specified may relinquish possession of the freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to shippers for a period of 96 hours to be computed as hereinafter set forth.

Where a carrier has relinquished possession of freight and collected the amount of tariff charges represented in a

freight bill presented by it as the total amount of such charges, and another freight bill for additional charges is thereafter presented to the shipper, the carrier may extend credit in the amount of such additional charges for a period of 30 days, to be computed as hereinafter set forth, from the date of the presentation of the subsequently presented freight bill.

Where icing charges are not published in the tariffs at fixed amounts determinable at the time the shipment moves from point of origin, and where freight charges are prepaid and icing charges are to be paid by the consignor, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance of the payment of the icing charges and may delay presentation of bills for such icing charges for a period not exceeding 15 days after the end of the calendar month during which the charges accrued and may extend credit in the amount of such charges for 15 days from the presentation of the bill for such charges.

Where the amount of demurrage charges is determinable under average agreements made in accordance with tariff provisions, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period, may delay the presentation of bills for such demurrage charges for a period not to exceed 15 days from the expiration of the authorized demurrage period and may extend credit in the amount of the demurrage charges accruing during the demurrage period for 15 days from the presentation of the bill for such charges.

Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight, the 48-hour and 96-hour periods of credit shall run from the first 12 o'clock midnight following the delivery of the freight.

Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the 48-hour and 96-hour periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill.

Every carrier shall present freight bills for all transportation charges except those herein specifically excepted to shippers prior to the first 12 o'clock midnight following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available to the delivering agent of the carrier.

Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

Sundays and legal holidays, other than Saturday half-holidays, may be excluded from the computation of the periods of credit.

The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in pay-

ment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of these rules. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

An appropriate order will be entered.

ORDER

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D.C., on the 20th day of January, A.D. 1931

Ex Parte No. 73

In re Section 3 of the Interstate Commerce Act as Amended by Section 405 of the Transportation Act, 1920, and Act of March 4, 1927.

It appearing, That on November 1, 1928, upon further consideration of the record and petition of the National Industrial Traffic League, this proceeding was reopened for rehearing and reconsideration:

It further appearing, That said rehearing and full investigation of the matters and things involved have been had and that the commission on the date hereof has made and filed a report on further hearing containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof:

It is ordered, That the rules and regulations prescribed in the order of June 4, 1920, in the above-entitled proceeding be, and they are hereby, modified and that the

following rules and regulations be, and they are hereby, prescribed to become effective March 10, 1931, and to remain in force and effect until further order of the commission.

The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as hereinafter set forth.

Where retention or possesesion of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to shippers for a period of 96 hours to be computed as hereinafter set forth.

Where a carrier has relinquished possession of freight and collected the amount of tariff charges represented in a freight bill presented by it as the total amount of such charges, and another freight bill for additional charges is thereafter presented to the shipper, the carrier may extend credit in the amount of such additional charges for a period of 30 days from the date of the presentation of the subsequent presented freight bill.

Where icing charges are not published in the tariffs at fixed amounts determinable at the time the shipment moves from point of origin, and where freight charges are prepaid and icing charges are to be paid by the consignor, the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance of the payment of the icing charges and may delay presentation of bills for such icing charges for a period not exceeding 15 days after the end of the calendar month during which the charges accrued and may extend credit in the amount of such charges for 15 days from the presentation of the bill for such charges.

Where the amount of demurrage charges is determinable under average agreements made in accordance with tariff provisions the carrier, upon taking precautions deemed by it to be sufficient to assure prompt payment of the tariff charges within the credit period, may delay the presentation of bills for such demurrage charges for a period not to exceed 15 days from the expiration of the authorized demurrage period and may extend credit in the amount of the demurrage charges accruing during the demurrage period for 15 days from the presentation of the bill for such charges.

Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight, the 48 and 96 hour periods of credit shall run from the first 12 o'clock midnight following the delivery of the freight.

Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the 48 and 96 hour periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill.

Every carrier shall present freight bills for all transportation charges except those herein specifically excepted to shippers prior to the first 12 o'clock midnight following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available to the delivering agent of the carrier.

Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

Sundays and legal holidays, other than Saturday half holidays, may be excluded from the computation of the periods of credit.

The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of these rules. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time.

By the commission, division 3.

(Seal)

GEORGE B. MCGINTY,
Secretary.

Interstate Commerce Commission

Ex Parte No. 73

Regulations for Payment of Rates and Charges

Decided May 19, 1960.

Upon further hearing, prior findings and orders modified so as to authorize the rail carriers to extend credit for the payment of charges on carload shipments for 96 hours and 120 hours, in lieu of 48 and 96 hours, respectively. Appropriate order entered.

Chas. P. Reynolds, Arthur J. Dixon, Walter C. Scott, Jr., Albert B. Russ, Jr., E. R. Leigh, and *Donal L. Turkal* for petitioners.

Charles B. Myers, Robert N. Burchmore, John S. Burchmore, Paul P. Watkins, Sam H. Flint, Samuel W. Earnshaw, John F. Coyle, and *Geo. H. Kinney* for interveners in support of petitioners.

A. T. Donadio, A. A. Green, K. H. Lundmark, William F. Zearfaus, and *Erle J. Zoll, Jr.,* for protestants.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the petitioners and the interveners in support thereof, and the protestants replied. Our conclusions differ from those recommended by the examiner. Exceptions and requested findings not discussed in this report nor reflected

in our findings or conclusions have been considered and found not justified.

In the prior report, 171 I.C.C. 268,[1] decided January 20, 1931, division 3 modified somewhat the credit regulations prescribed in 57 I.C.C. 591 for the payment of railroad freight charges by shippers and authorized the railroads to extend the periods for the payment of such charges on carload traffic to 48 and 96 hours. By a joint petition, certain southern rail carriers request that we extend the presently authorized credit periods on carload traffic to 96 and 120 hours, the same as those now authorized on less-than-carload traffic, in 273 I.C.C. 681. The National Industrial Traffic League, Olin Mathieson Chemical Corporation, Wilson & Toomer Fertilizer Company, Quaker Oats Company, Ceco Steel Products Corporation, Armour & Company, Georgia-Alabama Textile Traffic Association, and The Associated Industries of New York State, Inc., appeared in support of petitioners. The railroads in official territory, other than the Chesapeake and Ohio Railway Company, appeared in opposition.

At the further hearing the practitioner for The Associated Industries of New York State, Inc., offered in evidence as an exhibit a tabulation of the results of a questionnaire circulated to its members. The protestants objected to the receipt in evidence of this exhibit. The examiner sustained the objection, on the ground that the exhibit was offered in evidence to show that answers were received from the members in response to the questionnaire and that the information contained therein was true, whereas the practitioner, who assisted in preparing the exhibit, was

[1] Other prior reports, 57 I.C.C. 591, 59 I.C.C. 456, 63 I.C.C. 375, 59 I.C.C. 351, and 273 I.C.C. 681.

not a regular employee of the intervener, and could not know the truth of the matters contained therein. In its exceptions, this intervener excepts to the examiner's ruling. We find that the examiner properly excluded the exhibit, and that if admitted after the hearing for another purpose, as urged, its acceptance would deprive the opposing parties of their right to cross-examine the person who prepared the exhibit.

Section 3(2) of the Interstate Commerce Act provides, among other things and with certain exceptions, that no carrier by railroad shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination.

The order of this Commission of January 20, 1931, provides that a rail carrier, upon taking precautions to assure payment of the tariff charges within the credit period specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges for a period of 48 hours computed in a manner prescribed in that order. The order further provides that where retention of possession of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions to assure the payment of the tariff charges within the credit period specified, may relinquish possession of the freight in advance of the pay-

ment of the tariff charges thereon and may extend credit in the amount of such charges for a period of 96 hours to be computed in a similar manner.

The petitioners urge that an extension of the present credit periods is necessary in order to enable the railroads to compete more effectively with their motor-carrier competitors, which have been authorized to extend more liberal credit privileges than the railroads, and to afford the shippers adequate time for the processing of the freight bills. Witnesses for the petitioners testified that they would benefit by the extension of the credit period because the policing of the two proposed credit periods, 96 and 120 hours, would be easier than the present three periods of 48, 96, and 120 hours, the latter applying only to less-than-carload quantities. They argue that a uniform period for the collection of both carload and less-than-carload freight charges would eliminate the necessity for keeping separate records on the two types of shipments, and remove the confusion or errors which now result where a shipper receives both carload and less-than-carload freight bills at the same time.

It is claimed that the extension of an additional 24 hours' credit would lessen the number of followup or credit-violation letters to consignees where payments are not received in the freight agent's office by the due date, which would save time and expense. It is argued also that changes in business conditions generally and in railroad conditions specifically, including marked decentralization of industry and automation in the use of multiple-purpose accounting machines, make it highly desirable and practicable for shippers in general to pay their freight charges on a weekly basis.

The shippers urge that the decentralization of industry has resulted in the maintenance by numerous commercial organizations of branches located at great distances from the office where the freight bills are paid, and therefore additional credit time is needed to pay the bills by the due date.

The protestants oppose the granting of the relief sought because (1) they do not believe that the more liberal credit privileges accorded by the motor-carrier industry has caused the railroads to lose traffic; (2) there has not been a sufficient change in conditions since the present credit periods were authorized to warrant an extension thereof; (3) if the petition were granted, competition would force the protesting carriers to make effective the credit extensions, which would result in an alarming and unnecessary reduction in their working cash; and (4) the adverse effect in the reduction of their working cash would far outweigh any benefits and conveniences which might be afforded interested shippers.

The proposed modification of the credit regulations would probably be of some advantage to the shipping public. The petitioning railroads urge that an extension of the credit periods would operate advantageously in their competition with the motor carriers. Under the present motor-carrier credit regulations, a motor carrier has 7 days in which to bill a shipper and another 7 days within which to collect the charges.

Both the petitioners and the protestants argue in great detail on the issue of whether the proposed extension of the credit periods would deplete the working cash of the railroads to a serious degree. The petitioners argue that any depletion of working cash resulting from the proposed

extensions would not constitute a serious problem, and that any resulting temporary inconvenience would be offset by the benefits derived from the improvement of the competitive situation with the motor carriers, as well as by probable economies that could result in the operation of the railroad credit departments. The protestants argue that the resulting depletion of working cash from the extension of the credit periods would have such a serious adverse effect upon them that it would be necessary to make substantial reductions in equipment purchases and maintenance, and to lay off a considerable number of their employees. The petitioners and the protestants are in disagreement as to the proper mathematical computations for use in determining the correct amount of the working-cash depletion that would result from the proposed credit-period extensions, but they agree that working-cash depletions would occur. In their exceptions, the petitioners indicate that, based upon their computations, the working cash of The Pennsylvania Railroad Company and The New York Central Railroad Company, for example, would be reduced, if each patron took the full credit time proposed to pay its bill, by $3,698,383 and $2,710,000, respectively. The corresponding amounts as computed by the protestants are $5,383,484 and $5,000,000. There is no indication on this record, however, that all shippers would take full advantage of the credit extension.

The petitioners argue that the proposed extension of credit periods is voluntary, and that the protestant carriers would not be required to establish the same credit periods. It is reasonable to assume, however, that other railroads would desire to accord their shippers credit periods the same as those offered by the petitioners.

We conclude that the proposed extension of the credit periods on carload traffic is desirable to enable petitioners to compete more effectively, in this respect, with their motor-carrier competitors; and that any disadvantages resulting from a reduction in petitioners' working capital would be offset by the benefits derived from the extension of the credit periods. Since the grant of authority herein to broaden the credit regulations is permissive only, and other railroads are experiencing similar competition with the motor carriers, our findings will be broadened to include the railroads generally.

We accordingly, find that the findings in the prior report, 171 I.C.C. 268, and the order issued pursuant thereto, as modified, should be further modified to authorize all rail carriers subject to our jurisdiction to extend credit for 96 and 120 hours with respect to charges on carload traffic, in lieu of 48 and 96 hours, respectively, under the present rules computation of time to be made in the same manner as provided in connection with the 48-hour and 96-hour periods. An appropriate order will be entered.

COMMISSIONER MCPHERSON, concurring in part:

I would extend the period to 120 hours for all shipments and would reopen Ex Parte No. MC-1 to determine if the credit periods for motor shipments should be made the same as the periods here authorized.

CHAIRMAN WINCHELL, whom COMMISSIONER HERRING joins, dissenting:

I fail to see how the 1-day extension of the credit period authorized by the majority would afford the railroads

an opportunity to meet in this respect the competition of the motor carriers, whose credit period is almost three times as long. I do not believe the resulting reduction in the railroads' working capital, shown by the record to be inevitable and substantial, is justified by the convenience afforded interested shippers.

COMMISSIONER FREAS, dissenting:

In my opinion, no substantial justification has been presented on this record for the requested modification of the credit provisions. However, I am not aware of any circumstances or special principle which warrant a different period for the extension of credit to shippers for transportation by one mode of carriage as against another.

Interstate Commerce Commission

Ex Parte No. 73

Regulations for Payment of Rates and Charges

Decided December 30, 1960.

On reconsideration, findings in report on further hearing, 310 I.C.C. 301,[1] modifying prior findings and orders so as to authorize rail carriers to extend credit for the payment of charges on carload shipments for 96 and 120 hours, in lieu of 48 and 96 hours, respectively, affirmed.

Appropriate order entered.

Appearances as shown in the prior report on further hearing, and, in addition, *A. C. Armstrong for protestants.*

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the report on further hearing herein, 310 I.C.C. 391, we found that prior findings and orders in this proceeding should be modified so as to authorize all rail carriers subject to our jurisdiction to extend credit for the payment of charges on carload shipments for 96 and 120 hours, in lieu of 48 and 96 hours, respectively. The protestants filed a petition for reconsideration and oral arguments, to which the petitioners and certain interveners replied. Upon consideration thereof, we reopened the proceeding for reconsideration on the record as made, but denied the request for oral argument. The facts stated in the report on fur-

[1] Other prior reports, 57 I.C.C. 591, 59 I.C.C. 456, 63 I.C.C. 375, 69 I.C.C. 351, 171 I.C.C. 268, and 273 I.C.C. 681.

ther hearing will be repeated only to the extent necessary for a clear understanding of the issues. For convenience, the railroads seeking modification of the credit regulations are referred to as petitioners.

Section 3(2) of the Interstate Commerce Act requires with certain exceptions, that no carrier by railroad shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. Subject to restrictive provisions, we have limited the extension of credit for transportation charges on carload traffic to 48 and 96 hours, the latter time being permitted where the retention of possession of the freight for the payment of charges would retard prompt delivery or the release of equipment or station facilities. On less-than-carload freight, the corresponding limits for the extension of credit are 96 and 120 hours, the same as sought by the petitioners on carload traffic.

The petitioners contend that expansion of the present credit periods is necessary so as to enable them to compete more effectively with their motor-carrier competitors, which are permitted to extend to shippers the equivalent of a maximum of 14 days in which to pay tariff charges.

Shipper testimony indicates that the present credit periods on rail carload traffic are inadequate to allow the preaudit or inspection of freight bills before payment. The decentralization of industry, in some instances, has resulted in the maintenance by numerous commercial organizations

of branches located at great distances from the offices where the freight bills are paid, and additional credit time is needed to pay such bills.

Numerous shippers are now using multiple-purpose accounting machines to process the payment of accounts. The efficient use of these accounting machines depends upon programing of the work to be processed thereon, and the extension of the credit period as sought would permit the payment of freight bills once each week and not require the special handling now necessary to avoid violating the credit regulations. Under the proposal, in many instances, shippers would pay all the freight bills rendered by a railroad, covering various carload shipments on different days within the same week, on one day each week. Thus, some of these bills would be paid in less than the maximum periods sought.

A considerable volume of followup or credit-violation letters must be sent to shippers, and contacts by telephone and personal visits must be made to enforce compliance with the present credit regulations. These letters and the payments often cross in the mail, which would not occur with such frequency if the credit periods were extended. The proposed modification would relieve the carriers of considerable paperwork with the attendant time and expense involved, and would eliminate shipper irritation caused by followup letters received after forwarding of the necessary payment. Uniform credit practices with respect to the billing for carload and less-than-carload shipments, including uniform credit periods, would tend to reduce error, save time in handling, simplify billing, and effect other economies. Moreover, the extension of the credit

periods would satisfy a shipper demand and place the railroads in a more favorable competitive position with the motor carriers.

A divergence appears as to the estimated loss by the protestant railroads of working cash which would result from the proposed modification of credit periods. The protestants assume that all of their credit customers would use the maximum credit period in all instances, and thus the reduction in working cash would be subsantial regardless of the computation used. As pointed out, the proposed extension of the credit periods would permit the payment of freight bills once a week, and many of the bills would be paid before the end of the credit period.

The authorization to extend credit, subject to the prescribed rules and regulations, is permissive rather than mandatory, and a wide degree of flexibility allows the individual carriers to use their managerial discretion in the use of approved credit regulations. For example, the railroads in official territory have not extended credit to shippers of less-than-carload freight except on a very limited basis, and their refusal to extend more credit on this type of carriage apparently has not affected the volume of their less-than-carload traffic. Thus, any loss of working capital under the proposed regulations can be controlled in some measure by the individual carriers' use of credit rules to fit their respective needs.

The record is clear that the proposed modification of credit periods will eliminate a source of annoyance to many shippers, will bring the petitioners' credit practices more nearly in line with those of their motor-carrier competitors, and will effect economies in their billing and auditing

operations. Considering all the evidence before us, we are convinced that the proposed modification is in accord with the exercise of sound managerial discretion, will not be unduly harmful if adopted by the protestants, and should be approved.

Upon reconsideration, the findings in the report on further hearing, 310 I.C.C. 391, are affirmed. An appropriate order will be entered.

COMMISSIONER HERRING, dissenting:

The railroads in official territory have not been forced by competition to extend their credit period to shippers of less-than-carload freight because of the small volume of that type of freight handled by the carriers. However, carload freight is the lifeblood of the railroads. If a competing carrier extends the credit period on carload freight, the other carrier will have no alternative but to extend its credit period also.

This record does not contain any evidence of ascertainable benefits that will accrue to the petitioning carriers if the requested authoritly is granted. Such a grant would benefit the shippers but to the detriment of the protesting railroads. No shipper witness considered the credit provisions material in determining what mode of transportation he would use. The relief sought would adversely affect the working cash reserves of the opposing railroads if adopted by them.

COMMISSIONER FREAS dissents.

Interstate Commerce Commission

Ex Parte No. 73[1]

Regulations for Payment of Rates and Charges

Decided April 8, 1966

Upon further hearing, prior orders prescribing rules governing the extension of credit by railroad and motor common carriers operating in interstate or foreign commerce modified in certain respects. Appropriate order entered.

Reginald Ames, Peter T. Beardsley, Curtis H. Berg, James A. Bistline, W. T. Brunson, James I. Collier, Jr., George S. Dixon, J. F. Edell, Kenneth H. Lundmark, Carl V. Lyon, William R. Rubbert, Richard R. Sigmon, Roy L. Sherman, Donal L. Turkal, and *Jeremiah C. Waterman* for respondents.

Alvin Altman, T. J. Ashe, John Douglas Clark, John M. Cleary, Ronald N. Cobert, M. M. Cooke, C. B. Culpepper, Arthur J. Dixon, John F. Donelan, S. S. Eisen, Howell Ellis, Harry F. Gillis, J. L. Givan, James C. Hardman, Glenn A. Hawkins, Stanley Hoffman, Leonard A. Jaskiewicz, S. Harrison Kahn, B. W. Latourette, Jr., G. H. Leonard, John C. Lincoln, Dickson R. Loos, Giles Morrow, Walter J. Myskowski, Wesley C. Newman, A. E. Norrbom, Theo

[1] This report also ebraces Ex Parte No. MC-1, *Payment of Rates and Charges of Motor Carriers.*

R. Scheider, Charles W. Singer, William L. Slover, Leonard Stelzer, Warren H. Wagner, Charles A. Washer, J. P. Welsh, and *Samuel B. Zinder* for shippers and shippers' associations.

Bryce Rea, Jr. and *Burton Fuller* for Transport Clearings of Los Angeles.

Ellis V. Gregory, William C. Mammarella, Asa J. Merrill, Theodore Polydoroff, and *Charles F. Riddle* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION ON FURTHER HEARING

TIERNEY, *Commissioner*:

These proceedings were handled under special rules of procedure. Numerous parties filed exceptions[2] to the examiner's recommended report and order; certain of those who filed exceptions as well as other parties, replied.[3] Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically discussed in

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[2] The following parties filed exceptions: C&H Transportation Co., Inc.; American Retail Federation; National Association of Freight Forwarders, Inc.; J. L. Cox & Son, Inc., Dunn Bros., Inc., and J. O. (Red) Willett Pipe Line Stringing Corporation; Transport Clearings of Los Angeles; American Trucking Associations, Inc.; Bureau of Inquiry and Compliance, Interstate Commerce Commission; and the National Industrial Traffic League.

[3] The following parties filed replies: Itofca, Inc.; C&H Transportation Co., Inc.; Freight Forwarders Institute; Transport Clearings of Los Angeles; The National Industrial Traffic League; National Association of Freight Forwarders, Inc.; Association of American Railroads and American Short Line Railroad Association; The Charter Oak Shippers Cooperative Association, Inc.; American Retail Federation; American Institute For Shippers' Associations, Inc.; and American Trucking Associations, Inc.

this report nor reflected in our findings or conclusions have been considered and found not justified.

In our prior reports we prescribed, and in certain instances modified, rules governing the extension of credit by railroads[4] and motor common carriers[5] operating in interstate or foreign commerce pursuant to the provisions of sections 3(2)[6] and 223[7] of the Interstate Commerce Act. These rules are published in Title 49, Parts 142 and 188, of the Code of Federal Regulations, hereinafter referred to as the CFR. The sections concerned in these proceedings are set out in the appendix hereto, part 1.

We reopened these proceedings for further hearing on July 15, 1963, and consolidated therewith a petition of the National Association of Freight Forwarders, Inc., filed May 24, 1962. Our purpose is to determine whether or not modification of the rules and regulations is necessary. As indicated in the order of reopening, the issues to be considered, among others, are:

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[4] 57 I.C.C. 591, 59 I.C.C. 456, 63 I.C.C. 375, 69 I.C.C. 351, 171 I.C.C. 268, 273 I.C.C. 681, 310 I.C.C. 391, 313 I.C.C. 97.

[5] 2 M.C.C. 365.

[6] "No carrier by railroad and no express company subject to the provisions of this part shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: * * *"

[7] "No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement and to prevent unjust discrimination or undue preference or prejudice: * * *"

(1) Should section 142.8 of the Code of Federal Regulations be modified so as require that sufficient information to render a freight bill be made available to the railroad within a reasonable period of time after delivery or after the shipment leaves the origin?

(2) Should the credit regulations distinguish between prepaid and collect shipments?

(3) Should similar provisions be made applicable to motor common carriers of property?

(4) Should carriers parties to these proceedings be required to obtain a surety bond from shippers before extending credit?

Matters to be considered in connection with the foregoing issues, among others, are: all practices involved in the extension of credit to shippers; reexamination of existing Commission precedents and pronouncements governing the extension of credit; the need for additional rules and regulations, if any, to control the extension of credit; and the existence of unjust discrimination or undue preference or prejudice in the extension of credit. All railroads and motor common carriers of property, operating in interstate or foreign commerce subject to the act were made respondents, and our Bureau of Enforcement (formerly the Bureau of Inquiry and Compliance), hereinafter called the Bureau, was made a party to the proceeding. Motor contract carriers are not sujbect to the credit regulations.

The exceptions are, generally speaking, directed to one or more of the examiner's findings and the replies are similarly restricted. We shall separately discuss each finding of the examiner, together with the supporting evidence, the exceptions thereto, and our conclusions.

Sections 142.1 and 188.1. —The Bureau proposed that sections 142.1 and 188.1 be modified so as to prohibit a carrier from extending credit to a shipper when the carrier's

prior experience with the shipper established that freight charges were not paid in accordance with the Commission's regulations. Once the shipper is placed on a cash basis, the carrier could not extend further credit until all past due charges are paid, and the shipper furnishes written assurance that future charges will be paid within the prescribed credit period. The Bureau considers this action necessary in view of the number of purported violations uncovered through investigations conducted by members of the Commission's staff. For example, an investigation at 29 freight stations of 26 class I railroads revealed that of 15,751 freight bills outstanding, 5,169 were overdue, and of that total over half were more than 10 days overdue. An investigation of 81 motor common carriers (14 class I, 29 class II, and 38 class III), revealed that all of the class I, 22 class II, and 28 class III carriers violated the credit regulations in one or more respects. The examiner's summary of the railroad's criticism of the investigation is set out in the footnote.[6] The railroads also circulated a questionnaire to

[6] "Several witnesses for the railroads have found serious weaknesses in the figures submitted by the Bureau concerning so-called violations. According to the Bureau's statement the delinquents there shown were based upon the assumption that the date of the freight bill is also the delivery date. Under the regulations, the period for determining a credit violation does not begin to run until the date of the freight bill or the delivery date, whichever is later. Since the delivery date is frequently later than the date of the freight bill, it is pointed out that at the time of the investigation it would be almost impossible to determine how many of the 5,169 bills would not have been overdue if the delivery date had been used where it was later. Another fact which the respondents contend affects the Bureau's figures is that the investigation included balance due freight bills, contested freight bills, and bills on which relief had been requested but not yet granted. There is no information as to how many of these situations are included in the Bureau's statement. A balance due bill is not subject to the 120 hour rule but rather enjoys a period of extension of 30 days computed from the date of presentation of the subsequently presented freight bill under sections 142.3 of the CFR."

the railroads investigated by the Bureau and 14 responded (all of the railroads were unable to respond within the time allotted). The results show that of a total of 445,984 collectible items accruing during the periods covered by the Bureau's investigation, 10,202 credit violations resulted, or 2.24 percent. The examiner found that (1) the Bureau's evidence had, to a great extent, been discredited, (2) while violations of the credit regulations exist, rigid standards such as those proposed by the Bureau would not be helpful, and (3) the evidence of record was too meager to support the changes suggested.

The Bureau specifically excepts to those findings. The exceptions of the American Trucking Associations, Inc., (A.T.A.) are directed to the general problem of compliance from a motor carrier standpoint, and will be subsequently discussed. The A.T.A., the National Industrial Traffic League, the railroads, and C&H Transportation Co., Inc., replied.

The Bureau in its exceptions contends that the examiner misconstrued the nature of the proceeding, in that he characterized its evidence as "meager" and "discredited" because in his judgment the violations were not shown to be willful or flagrant, whereas no attempt was made to show that they were willful or flagrant; that he gave undue weight to the evidence of the railroads and failed properly to evaluate the evidence as a whole; and that its proposal is supported by substantial evidence of widespread violations.

We see no basis for concluding that the examiner misconstrued the nature of the proceeding. Clearly, the uncontradicted rebuttal evidence of the railroads weakens the

Bureau's statement. But we cannot agree, as maintained by the railroads, that the 10,202 credit violations disclosed by the questionnaires can properly be characterized as "*de minimus,*" and are not sufficiently numerous to warrant our concern. However, for reasons that will be discussed hereinafter, we are not persuaded that the evidence developed in this record justifies the adoption of the rules proposed by the Bureau.

The investigation of motor common carriers conducted by personnel of the Bureau of Operations and Compliance (formerly the Bureau of Motor Carriers) was summarized by the examiner and has been referred to herein. An additional investigation by personnel of the Bureau of Accounts included 50 class I and 33 class II carriers. Of this number, 70 carriers, consisting of 46 class I and 24 class II were found to be in violation of the credit regulations in 1 or more respects. Thus, 134 of the 164 motor carriers investigated were found to be in violation of the credit regulations to a greater or lesser degree.

Motor carrier witnesses testified to the effect that if a motor carrier demands payment within the period prescribed by the regulations, it often finds itself threatened with the loss of the busienss, i.e., if one carrier refuses to extend credit, the shipper will simply go to another motor carrier which will do so.

The Bureau investigations indicate that with few exceptions the 7-day billing requirement following delivery is being complied with. The principal violations discovered involve excessive extension of credit to shippers.

Evidence presented by the Bureau, A.T.A., and Transport Clearings supports the conclusion that shippers are the major cause of violations and we so find.

A related question concerns the Commission's authority to impose sanctions against shippers as well as motor carriers. Transport Clearings of Los Angeles and the A.T.A. filed exceptions to the examiner's finding that the Commission lacks authority to promulgate rules which would, in effect, regulate shippers, and the railroads and the N.I.T. League replied. Transport Clearing proposes a complete revision of the motor carrier credit regulations based on the assumption that the Commission can promulgate rules which would regulate shippers as well as carriers. It cites *American Trucking Assns., Inc.* v. *United States*, 344 U.S. 298, wherein the Supreme Court discussed the power of the Commission to enact rules regulating the leasing of equipment. It contends that the specific grant of authority to regulate credit in section 223, coupled with the duty to "enforce all provisions of this part" in section 204(a)(6), when read in conjunction with the foregoing court opinion, which looks to substance rather than form, compels the conclusion that the motor carrier credit regulations apply to shippers. The cited case is not in point. Although the *American Trucking* case does stand for the proposition that the Commission has broad general regulatory powers, it must be distinguished from the instant proceeding on the basis that the court specifically referred to statutory language approving regulation, that the validity of the entire Motor Carrier Act was threatened by a contrary result, and that the persons being regulated were carriers generally under the jurisdiction of the Commission.

Transport Clearings' second argument is premised on the following language in *United States* v. *City of Jackson,* 318 Fed. 2d 1: "The power in the United States and in the Commission to enforce the substantive provisions of the Act must carry with it the power to make such enforcement effective. Here enforcement can be made effective only if relief is granted against the noncarrier defendants who are causing the carriers to violate the act." The gist of this argument is that section 222(c) and section 1 of the Elkins Act, which contain punitive provisions for violations of the act, apply to shippers as well as carriers; therefore, application of the principle in the above-cited case requires the finding that a shipper who procures transportation on credit in violation of the credit regulations not only violates the law, but the Commission is authorized to promulgate a regulation so stating under its authority to issue declaratory orders and interpretive rules. *United States* v. *City of Jackson, supra,* is not in point. There, the issue was whether this Commission could enjoin the city and its police officials from maintaining signs on sidewalks adjacent to bus and rail terminals designating particular waiting rooms as "for Whites only" or "for Colored only." In 12 separate instances the Jackson police had arrested Negroes for refusing to leave a "white" waiting room. The city was attempting to continue practices which the Commission had found to be discriminatory by what amounted to subterfuge. That situation is far removed from the issue before us.

The A.T.A. directs attention to a notice issued by the Commission on August 3, 1936, entitled "Collection of Rates and Charges — Credit Period Not to Be Extended," which stated in part as follows:

> Shippers and receivers of freight who deliberately withhold, beyond the credit period authorized by the Commission's regulations payment of tariff rates and charges due for the transportation of property in interstate or foreign commerce, should be reminded that section 222(c) of the Motor Carrier Act provides in part that any shipper or consignee who shall accept or receive any concession or discrimination in violation of any provision of the Motor Carrier Act, or who shall knowingly or willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carriers, shall be deemed guilty of a misdemeanor and upon conviction be subject to the penalties provided by the act.

It relies on sections 222(c) and 204(a)(6) to support its contention that section 223 should be construed to include shippers as well as carriers. We do not agree. The A.T.A. has failed to distinguish between violations of credit regulations by shippers which constitute a rebate, concession, or discrimination, and the question of whether shippers are subject to the credit regulations in their entirety. In other words, as we previously indicated, section 222(c) is punitive in nature; it follows, as stated in the 1936 notice, that violations of the credit regulations by a shipper which constitute a rebate, concession, discrimination, et cetera, in violation of any provision of the Motor Carrier Act are misdemeanors. It does not follow, however, that shippers are subject to the credit regulations. Sections 3(2) and 223 are clear and unambiguous; there can be no doubt but that Congress would have specified that shippers were to be included in those sections, had this been its intention.

We believe that the evidence establishes many and continued violations of the credit regulations. However, we are unable to conclude on this record that rigid rules as

proposed by the Bureau would provide a practical or desirable solution.

As the examiner pointed out, there are many reasons for credit violations which are beyond correction by rules, e.g., where shippers have unexpected peak workloads, where there are controversies over amounts due, where additional information is needed such as weights of evaluations, where standard office procedures are in the process of change, where temporary cash flow problems occur, and where it becomes necessary to check the validity of charges with third persons. Stringent credit rules as proposed by the Bureau would destroy the flexibility needed to meet problems of this nature. Moreover, we have found that violations of motor carrier credit regulations are attributable, in the main, to shippers, the carriers generally being in compliance with the 7-day billing requirement.

Particularly disturbing is the evidence in this proceeding revealing that motor carriers who refuse to extend credit are threatened by shippers with the loss of business. This practice, of course, is to be condemned. Where, because of such threats, credit beyond the period prescribed by the regulations is granted, the shipper is guilty of solicitation and acceptance of an unlawful concession, and therefore in violation of section 222(c) of the act. Our staff is being instructed to follow this situation closely and to initiate prosecutive action where warranted.

While we have no authority under the act directly to regulate shippers, we do have the power to prohibit carriers from extending credit to shippers who owe past due charges, and if violations of our rules continue, we will reopen this proceeding to promulgate additional regulations. We will also consider the possibility of requeseting Con-

gress to amend sections 3(2) and 223 so as to make shippers subject thereto.

Extension of credit periods.—The examiner found that the present credit periods for railroads and motor carriers should be left undisturbed. His summary of the evidence and conclusions are set out in the appendix, part II. The N.I.T. League excepted to the finding "with some reluctance," and the railroads replied. The League's position is that any credit regulations established by us should be uniform "with a minimum period of seven (7) days." It characterizes the extension of credit for transportation service as involving the most restrictive time limits of any large-scale corporate commercial transaction in the Nation. Attention is also called to the fact that since spokesmen for the railroad industry are "constantly and earnestly" asserting that there should be no difference in treatment as between railroads and other modes of transportation, including motor carriers, under the Interstate Commerce Act, this principle should be applied to credit regulation.

Issue is also taken with the evidence purporting to show the effect of an extension of the credit period on railroads currently operating on a marginal basis. The League emphasizes that generally speaking the industry is in excellent financial health. It contends that the evidence of the New York Central witness regarding depletion of working capital which would result from the extension of the credit period, overlooks the fact that freight bills will, in many instances, be paid in less than 7 days, and it fails to take into account the effect on the railroad's liquidity of various bank freight payment plans (those plans will be discussed in the following section of this report).

We acknowledge that uniformity is desirable in this field, and that extension of the credit period for railroads may be in the public interest. One of our purposes in instituting this proceeding was to consider all practices involved in the extension of credit to shippers. The examiner found that shippers did not contend that problems encountered in connection with existing credit periods were insurmountable. The N.I.T. League excepted to his finding. While it criticizes the present credit periods it does not present suggested improvements supported by substantive evidence. We, of course, are bound by the record as made. In these circumstances, we find that this record would not support an extension of the credit periods.

Freight payment plans. — The examiner's description of various freight payment plans is set out in the appendix, part III. He placed considerable emphasis on these plans, stating at page 20 of the recommended report as follows:

> * * * Never has there been such emphasis placed upon freight payment plans as have been presented in this proceeding. This carries a great deal of weight with the examiner and it is recommended that the Commission encourage the use of these plans which present such a promise of success in the future. They are designed not only to accommodate shippers but to insure compliance with the credit rules * * *.

We agree with the examiner that use of these credit plans seems to have been beneficial. There is no indication on this record that they are unlawful. They appear to offer a solution to the problems encountered under the present credit regulations, and their operations are ideally suited to the use of data processing equipment. As the volume increases, future unit costs should decline. Assuming that the savings will be passed on to the shipping public, they should win even wider acceptance.

Section 142.8. — The question presented on exception is whether this section should be modified so as to require shippers to furnish carriers with information sufficient to compute the tariff charges within a stated period of time. Reference to the appendix, part 1, indicates that the present section does not mention this matter. There is no comparable section in the motor carrier regulations.

An investigation by the Bureau revealed that it was a common practice among freight forwarders, shippers' associations, and shippers' agents, operating under the exemption of section 402(c) of the act, as well as various shippers of carloads of mixed merchandise, to delay tendering sufficient information to enable the carriers to compute the tariff charges. In some cases there were delays of 102 days from the time the shipment moved until the time freight charges were ultimately collected, and it was not uncommon for the carriers to wait 30 days for sufficient information to render a freight bill. The grain and ore industries presented specific evidence as to how they would be adversely affected by the proposed modification. Numerous other parties either favored or opposed the proposal. The examiner found that the Commission lacked authority to promulgate rules which would regulate noncarriers, and that in effect, no need had been shown for amending the section, except as hereinafter indicated.

After concluding that a certain degree of flexibility is necessary in this area, he adopted certain changes suggested by the railroads which were not excepted to, and added two new sentences to the rule, as follows:

> A carrier may not extend further credit to any shipper which fails to promptly furnish sufficient information to allow a carrier to render a freight bill

within a reasonable time after the shipment is tendered to the origin carrier. As used in this section the term "shipper" includes freight forwarders as well as shippers' associations and shippers' agents within the meaning of section 402(c) of part IV of the Interstate Commerce Act.

On exception, the Bureau expresses surprise that the examiner would incorporate "reasonable time" in his proposed amendment. It considers that term to be vague, indefinite, and unenforceable, and suggests that the second sentence of the proposed rule be modified as follows:

> A carrier may not extend further credit to any shipper which fails to furnish the carrier with the necessary billing information within 24 hours after the shipper obtains such information; and the carrier must then forward such information to its billing point within 24 hours after receiving it.

The National Association of Freight Forwarders, Inc. (N.A.F.F.), one of the principal parties to the title proceeding (its petition filed May 24, 1962, was consolidated with the instant proceedings for further hearing), would accept the first sentence of the examiner's proposal, and word the remainder of the section as follows:

> Such sufficient information must be made available to the origin carrier, at the forwarding point, no later than 10 days after it[9] has tendered its shipments to the origin carrier. If such information is not made available within this specified time, further credit must not be extended to the shipper. As used in this section the term "shipper" includes, but is not limited to, freight forwarders, as well as shippers' associations and shippers' agents within the meaning of section 402(c) of part IV of the Interstate Commerce Act. Permission to waive the above 10 day period may be obtained by application to the Interstate Commerce Commission.

[9] We assume that the reference is to shippers.

The following results are to be achieved by these modifications. First, the shipper would furnish sufficient billling information to the carrier within the specified time period, thereby eliminating the indefiniteness created by the examiner's use of "promptly." Second, further credit would not be given if a shipper failed to furnish sufficient information within the specified period, thus eliminating the examiner's use of "may" which is permissive. Lastly, industries such as grain could except themselves from the provisions upon proper application to the Commission.

The Freight Forwarders Institute considers the last sentence of the examiner's proposal to be unnecessary since all parties are shippers insofar as the carrier is concerned. In the event this sentence is included in section 142.8 it also suggests that "but is not limited to" be inserted after "includes." The railroads and the Freight Forwarders Institute are opposed to any change in the examiner's proposal. The former emphasize that "reasonable" appears frequently in the Interstate Commerce Act, and has served as a flexible standard in the regulatory field for many years. The N.A.F.F. opposes the Bureau's proposal.

As noted, section 142.8 does not refer to this question. While it is true that the Bureau investigation indicated that there are instances of excessive delay by shippers in furnishing carriers with sufficient information to render freight bills, the examiner's proposed wording was designed to prevent a carrier from extending further credit to shippers responsible for such delays. In view of the lack of evidence of record upon which to determine what particular period to require, we are unable to adopt the time periods suggested by the Bureau or the N.A.F.F. at this time. If

the rule, as here adopted, does not result in sufficient correction of existing conditions, we will reopen the proceeding for the purpose of setting specific periods. Moreover, contrary to the allegations of the N.A.F.F., there is no probative evidence of discrimination resulting from delay on the part of shipper in furnishing carriers with sufficient information to render freight bills. We agree with the N.A.F.F. that the word "promptly" should be eliminated from the examiner's proposal, and that "may" which is permissive should be striken and "shall" inserted. Those changes, together with the suggestion of the Freight Forwarders Institute, will be incorporated in section 142.8, as revised by the examiner.

Surety bond issue.—The examiner found that the evidence of record would not support a finding that nonprofit shipper organizations should be required to post a surety bond before being extended credit for freight charges. His summary of the evidence and conclusions are set out in the appendix, part IV. The Bureau and the N.A.F.F. excepted to this finding. Relies were filed by Itofca, Inc., the N.I.T. League, the railroads, Charter Oak Shippers Cooperative Association, Inc., American Retail Federation, and the American Institute For Shippers' Associations, Inc.

The Bureau argues that although the posting of a surety bond by nonprofit shipper organizations might be discriminatory, such discrimination would not be undue or unreasonable, citing *Koppers Company, Inc.* v. *United States,* 166 F. Supp. 96. And it cites *Sample* v. *Atchison, T. & S. F. Ry. Co.,* 139 *I.C.C.* 324, where a requirement by the carrier that grape shippers be required to furnish a surety bond was found not to result in undue prejudice.

There the record justified the surety bond requirement; such is not the case here. Imposition of such a requirement on one class of shippers in these circumstances would clearly constitute undue discrimination. The Bureau, on being confronted with the problems presented, particularly the enormous cost involved, suggests on exception that these organizations be required to furnish a single bond of $10,000 in the aggregate, covering the charges of any and all common carriers in interstate commerce used by the association. Although this represents an improvement over the Bureau's initial suggestion, such a requirement would place an undue burden on nonprofit shipper organizations which is not warranted on this record. Moreover, as the Bureau admits, a surety bond aggregating $10,000 would not be sufficient to cover the large losses suffered by the carriers in the majority of instances cited by the examiner.

The N.A.F.F. is concerned by the large losses suffered by the railroads when nonprofit shipper organizations become bankrupt. As the examiner states, the premium cost of surety bonds which would protect against such losses would be enormous. The examples cited by N.A.F.F. would not justify such action.

The Bureau suggests, as an alternative in the event the surety bond requirement is not adopted, that nonprofit shipper organizations be required to present the carriers with a statement to the effect that the organization is not the beneficial owner of the goods being shipped, and advising the carrier of the identity of the beneficial owner. The Freight Forwarders Institute supports this alternative and finds it in keeping with that part of section 142.1 which provides that carriers may extend credit for the specified

periods upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges.

The railroads oppose this alternative on the ground that little purpose would be served by knowing the names of the beneficial owner since they are operating through a corporate entity, and therefore would not be liable for the debts of the corporation. Itofca, Inc., also opposes this alternative. However, in *Atlanta Shippers Assn. Inc.—Investigation,* 322 I.C.C. 273 at 288, the Commission held that shippers who are members of incorporated associations are responsible as the beneficial owners of the goods moved and that there can be no effective insulation between them and third persons. Also, we assume that all railroads take precautions to assure that credit is not extended in the future to shippers who have filed for bankruptcy, or have not paid past due freight bills for other reasons. Carriers must keep in mind at all times that the extension of credit to shippers is the exception and not the rule. Therefore, they must not extend credit as a matter of course but only when they are assured of payment. For these reasons they should know the identity of the beneficial owners of the goods shipped by nonprofit shipper organizations. We will expect them to require such organizations to furnish the names of the beneficial owners in the future in the bills of lading or at least require that the bills of lading incorporate by reference a document containing such names. We feel such a requirement will be acceptable because of its salutary aim. Accordingly, appropriate changes will be made to sections 142.1 and 188.1.

Specialized motor carriers.—Certain motor carriers contend that due to their specialized operations they should

be exempted from the present credit regulations, or that exceptions should be provided for them. The examiner's description of the operations of these carriers is set out in the appendix, part V. He found that, but for isolated instances, these carriers have been able to comply with the present credit regulations; that there is no proof on this record that other such carriers do not comply with the credit regulations; that the carriers have failed to show that the regulations are incompatible with their operations; and that the modifications proposed by them are unwarranted.

C&H Transportation Co., Inc. (C&H), excepted, as did J. L. Cox & Son, Inc., Dunn Bros., Inc., and J. O. (Red) Willett Pipe Line Stringing Corporation. The exceptions of C&H are of a general nature. Other heavy haulers are presumably able to comply with the credit regulations without difficulty, since they did not participate herein. We agree with the examiner that C&H has failed to show that the credit regulations are incompatible with its operations. The problems confronting pipeline-stringing carriers are unusual in that they are generally required to contract with the prime contractor, the construction company. Such a contract frequently provides that they are bound by the conditions, restrictions, and limitations enumerated in the contract between the transmission company and the prime contractor. The latter contract provides for retention by the transmission company of a specified percentage, usually 10 or 20 percent, of the amounts due the prime contractor for work completed. The prime contractor withholds an identical percentage from the amount due the carrier for transportation services. As stated by the examiner, it is not unusual for the carrier to have amounts in excess of

$50,000 or $100,000 due at the completion of a pipeline project, which requires several months. In most instances, the prime contractor is not financially able to subsidize the carrier, and in no instance is it willing to do so. And motor carriers are required to agree to the terms generally imposed in such contracts or forego the business. These carriers face the threat of private carriage, since there is a tendency on the part of contractors who specialize in pipeline construction to purchase the equipment needed to lay the pipe.

The prescription of rules and regulations which one segment of a regulated industry cannot comply with accomplishes nothing from a regulatory standpoint, and may encourage violations. While we agree with the examiner that this record would not support a finding that the credit rules are incompatible with the operations of specialized carriers, we realize that motor carriers such as those engaged in pipeline-stringing may not be able to fully comply with the credit regulations. Examples of contracts, and other pertinent data must be presented in detail, however, to establish that inability. We would extend the credit period of a specialized motor carrier only upon a clear and convincing showing that forces beyond its control make it impossible for the carrier to comply with the credit regulations. Such a carrier should file an appropriate petition with the Commission, and, in the event relief is warranted, an appropriate order will be entered.

Unopposed findings.—No exceptions were filed to a number of the hearing examiner's findings. They are summarized as follows;

(1) O'Boyle Tank Lines proposed that when a delinquent shipper is placed on a cash basis by one

carrier the shipper should automatically be placed on a cash basis by all carriers. The proposal was opposed by the A.T.A. and many individual motor carriers who feared that its adoption would result in loss of revenue as well as increased operating expenses due to added paper work, the need for constant surveillance of accounts, et cetera. The proposal was rejected, since better utilization of the various freight payment plans represents a superior solution to this problem.

(2) The National Association of Freight Forwarders urges that motor carriers operating under plan I trailer-on-flatcar service should be permitted no greater credit than that allowed an ordinary shipper, and the credit regulations should be amended accordingly. Plan I TOFC operations were found, in *Substituted Service—Piggyback,* 322 I.C.C. 301, 349, to constitute a valid through-route and joint-rate arrangement within the meaning of section 216(c) of the act. Therefore, the only credit involved in a plan I operation is that extended in interline settlements. Section 142.15 of the credit regulations specifically exempts interline settlements from their application. The evidence is not convincing that the railroads are unlawfully extending credit to motor carriers as alleged.

(3) The first report in the title proceeding (57 I.C.C. 591, 596) specified that no rules would be prescribed for the collection of prepaid freight shipments. There was no such finding in the report in the embraced proceeding. Both groups of carriers extend credit on the two types of shipments. There should be no distinction made, as far as the credit regulations are concerned, between prepaid and collected shipments.

(4) The American Retail Federation urges that the Commission adopt the credit regulations of the Civil Aeronautics Board which provide, in substance, for a 10-day credit period with a uniform billing 10 days after the date of shipment. Standardization and uniformity among all modes of transportation is com-

mendable under the proper circumstances. The railroads and motor carriers vigorously oppose any extension of their respective credit periods. Any extension of time means additional cost to the carrier without any assurance of shipper compliance. The proposal is rejected.

While a pleading of the American Retail Federation, filed October 12, 1964, is an exception from a technical standpoint, it merely urges that the standardization of credit regulations be made a subject at the interagency conferences held by representatives of the Commission and other regulatory agencies. Standardization in this field may be difficult to achieve due to the different problems confronting various modes of transportation, as indicated by this record. There is no doubt that where practical, standarization in this area is a desirable goal. Appropriate consideration will be given to this suggestion.

We find that the foregoing findings of the hearing examiner are fully supported by the evidence, and adopt them as our own. The examiner proposed to amend the CFR to effectuate the third finding, but such action is not necessary.

Section 188.1 provides for a 7-day credit period, excluding Sundays and legal holidays other than Saturday half-holidays. According to the A.T.A., Saturday is now a full holiday for clerical workers in the trucking industry. It requests that we specifically exclude Saturdays from the credit period as is done in connection with the railroad credit period in section 142.10, and that request is unopposed. Section 188.1 will be amended accordingly.

Findings.—On further hearing, we find that sections 142.8 and 188.1 of the Code of Federal Regulations should

be amended as hereinbefore set forth, and that no other modifications governing the extension of credit by railroads and motor common carriers operating in interstate or foreign commerce are warranted on this record.

An appropriate order will be entered.

COMMISSIONER MURPHY, dissenting in part:

While I believe the amendments to the rules will be of some benefit, I find that they do not go far enough. I would prefer that a specified period of time be prescribed within which information sufficient to enable the carrier to compute the tariff charges must be submitted. As shown on the record, each 24-hour extension in the credit period depletes the working capital of the railroads by $32 million. Since a number of railroads are currently operating on a marginal basis, the Commission would be performing a valuable service by preventing shippers from withholding information necessary for the computation of freight bills for an indefinite period of time and thereby obtaining an extension of the credit period. The same situation in all probability exists in the motor carrier industry.

I also disagree with the majority's finding that we have no authority under the act to regulate shippers. The report finds, and rightfully so, that shippers are the major cause of credit violations, but refuses to take direct action against the violators. In my opinion, sections 3(2) and 223 are applicable to shippers as well as carriers and it is our duty to enforce these statutes.

In addition, I fail to see where a requirement that nonprofit transportation organizations be required to furnish a surety bond before obtaining credit would be burdensome

or constitute undue discrimination. According to our regulations a carrier may extend credit if it chooses to do so, only after taking precautions which it deems sufficient to assure payment of the tariff charges within the specific credit period. It is apparent that in at least one instance no such precautions were taken because a shippers' association with assets of $1,300 became bankrupt and the amount it owed for transportation services to several rail carriers exceeded $200,000. Other instances were cited where motor carriers suffered similar but somewhat smaller losses. If a surety bond had been provided in these instances the carriers would have been protected. I am not convinced that the expense of obtaining such a bond would not be warranted. Any type of indemnity or surety bond to guaranty payment would suffice. Rail carriers have for many years required that bonds be furnished as a substitute for a bill of lading before releasing a shipment. The type of bonds required under such circumstances are listed under section 3, rule 7, of the Uniform Freight Classification and they could be made applicable to the situation herein. If the carriers are adverse to providing for their own protection for fear of antagonizing shippers, many of whom are members of shippers' associations, we should provide regulations whereby this insurance is provided for them.

There is no merit to the charge that the requirement of a surety bond would constitute discrimination in violation of section 3(1). This section relates only to undue or unreasonable discrimination, prejudice, or disadvantage. Strict equality in all respects is not the objective of this section; carriers are given some latitude in their rates and practices, dependent upon the circumstances. There is no

one shipper being singled out here; the surety bond proposal is directed toward a single class of similarly situated shippers, namely nonprofit organizations, and is applied to all shippers within this class as well as to all carriers serving such shippers. Moreover, because of their type of organization they differ and are apart from the ordinary shipper. They consist of both unincorporated groups of individual shippers and incorporated nonprofit organizations. While there may be some exceptions, such organizations or groups all too often have little or no working capital. There is a great deal of instability in many of these organizations, and carriers which extend credit to them risk substantial losses. Therefore, there is a sound and reasonable basis for requiring carriers to obtain a surety bond before extending credit to such organizations. Regulations that provide for protection where a substantial risk is involved cannot be labled discriminatory.

COMMISSIONER WEBB, whom COMMISSIONER GOFF joins, dissenting in part:

I agree with the conclusions of the majority except insofar as the report finds that the Commission lacks authority directly to make credit regulations applicable to shippers, as well as carriers. While I would not at this time adopt the rules proposed as to shippers. I would not foreclose the possibility of promulgating such regulations.

APPENDIX

PART I

1. *Railroad credit regulations.*

142.1 *Carrier may extend credit to shipper.*—The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as set forth in this part.

142.1a *Less-than-carload traffic.*—Effective March 24, 1949, respondents are hereby authorized to extend credit for 96 hours and 120 hours in respect of charges on less-than-carload traffic in lieu of 48 hours and 96 hours, respectively, under the present rules in this part, computation of time to be made in the same manner as provided in connection with the 48-hour and 96-hour periods.

142.1b *Carload traffic.*—Effective on March 10, 1961, the rail carriers subject to the jurisdiction of the Interstate Commerce Commission are hereby authorized to extend credit for 96 hours and 120 hours in respect of charges on carload traffic, in lieu of 48 hours and 96 hours, respectively, under the present rules in this part, computation of time to be made in the same manner as provided in connection with the 48-hour and 96-hour periods.

142.3 *Additional charges.*—Where a carrier has relinquished possession of freight and collected the amount of tariff charges represented in a freight bill presented by it as the total amount of such charges, and another freight bill for additional charges is thereafter presented to the shipper, the carrier may extend credit in the amount of such additional charges for a period of 30 days, to be computed as set forth in this part, from the date of the presentation of the subsequently presented freight bill.

142.6 *Periods of credit following delivery.*—Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight, the 48-hour and 96-hour periods of credit shall run from the first 12 o'clock midnight following the delivery of the freight.

142.7 *Periods of credit following presentation of freight bill.*—Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the 48-hour and 96-hour periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill.

142.8 *Presentation of freight bills.*—Every carrier shall present freight bills for all transportation charges except those specifically excepted in this part to shippers prior to the first 12 o'clock midnight following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available to the delivering agent of the carrier.

142.10 *Saturdays, Sundays and legal holidays may be excluded from period.*—In the computation of the various periods of credit Saturdays, Sundays, and legal holidays may be excluded, and where the time for presentation to shippers of freight bills for transportation and related charges falls on Saturday, Sunday or a legal holiday such bills may be presented prior to 12 o'clock midnight of the next succeeding regular work day.

142.15 *Interline settlement of revenues.*—Nothing in this part shall be interpreted as affecting the interline settlement of revenues from traffic which is transported over through routes composed of lines of common carriers subject to parts I, II, or III of the Interstate Commerce Act.

2. *Motor common carrier credit regulations.*

188.1 *Carrier may extend credit to shipper.*—Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor vehicle may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days, excluding Sundays and legal holidays other than Saturday half-holidays. When the freight bill covering shipment is presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following delivery of the freight. When the freight bill is not presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following the presentation of the freight bill.

188.3 Period of credit following delivery of freight. Freight bills for all transportation charges shall be presented to the shippers within 7 calendar days from the first 12 o'clock midnight following delivery of the freight.

PART II

Should the Credit Period for Railroads and Motor Carriers be the Same?

Under the present regulations rail carriers are authorized to extend credit to 96 and 120 hours on carload and less-than-carload traffic. Motor carriers on the other hand are authorized to allow shippers credit for a period of 7 days. Many of the parties contend that the credit periods should be the same for both motor and rail. It is argued that the mechanics of preparing and submitting freight bills for payment of both rail and motor carriers are the same and require the same time period. When the bills are received by the industry the procedures for processing and payment are the same. Orderly accounting methods preclude any distinction being made in the time being required

for payment. From a competitive standpoint, it is argued that the longer credit period permitted for motor carriers puts the rail carriers at a definite disadvantage. This situation is said to be more pronounced as the rail carriers institute more and more piggyback service. The Commission is asked to give consideration to conforming the credit periods with the latest developments in accounting procedures. It is contended that centralized machine accounting requires more time for the orderly processing and payment of freight bills. The Institute of Shortening and Edible Oils, Inc., whose members produce 80 percent of the shortening, edible oils, and fats manufactured in this country, recommends that the period be extended to 14 days for both rail and motor carriers. This company presently schedules the payment of freight bills twice weekly but the efficient use of accounting machines with a resultant lower cost demands scheduled payments once each week.

The Minnesota Mining and Manufacturing Company processes and pays approximately 50,000 freight bills each month. Of the 16 branch warehouses and 32 plants of this company located throughout the United States, its freight bills are all processed at St. Paul. It argues that the railroads are the only agency which allows so short a period of time for the payment of bills. For most other industries, 10 days is the minimum period for a 2 percent cash discount, and many organizations have extended this to 15 and 20 days. Normal mail and inter-company communications are said to require nearly all of the time the current credit period allows, especially on freight bills mailed from outlying plant and branch warehouse locations. This company urges the Commission to liberalize the carriers' credit rules and permit the railroads to extend their credit period 7 days on all rail traffic. Westinghouse Electric Corporation joins in this same recommendation as does the Belknap Hareware and Manufacturing Company of Louisville, Kentucky.

The NIT League, a nationwide organization of shippers, also emphasizes the necessity of amending the credit regulations to meet the modern commercial needs of the shipping public. The League contends that the increased

use of data processing multiple-purpose accounting machines and the scateration of plant facilities over a wide geographical area with a centralized payment center, necessitates a longer credit period than presently allowed on rail shipments if violations of the regulations are to be avoided. It urges that the credit regulations applicable to rail carriers be liberalized and extended up to 7 days, the same as motor carriers.

The railroad respondents supported by the Freight Forwarder Institute, representing some 20 freight forwarders, are opposed to any extension of the rail credit period. They point out that the Congress has exercised close control over railroads extending credit by prohibiting it entirely except under regulations approved by this Commission. It was recognized that there was a vital necessity for the railroads to maintain an adequate working capital. It is axiomatic that as the credit period is extended the more working capital is needed for the operation. In this connection, it is estimated that the impact of each 24-hour extension in the credit period would deplete the working capital on the New York Central System by more than $2 million. For all railroads this would approximate $32 million. The rail carriers argue, therefore, that the damage to their working capital would be much more severe as a result of any extension of time than the inconvenience or hardship that may accrue to any shippers. Since a number of the railroads are currently operating on a marginal basis, an extension of the time period within which to pay freight bills would be particularly damaging to those carriers. ***. While it is natural for a debtor to favor longer periods in which to pay, creditors, on the other hand, desire to receive their payment as soon as possible. It is contended by these parties that since there has been no clear showing of inconvenience or hardship impossible of overcoming, the extension of time in which to pay a rail freight bill would not eliminate, or perhaps not even lessen, credit violations. At best it would simply postpone the critical date for a day or so.

Under the present regulations the granting of credit is optional with the carrier after it is satisfied that the risk

involved is worth taking. It may at anytime remove a shipper from its credit list. Thus it is argued that regardless of any revised rules which might be adopted to control this problem there will still be some shippers who will fail in meeting them. Thus it is argued that a mere extension of time is not the solution to this inherent troublesome situation and as a result would not improve upon the results of the present credit period.

The record made by the shippers fully presents the problems confronting them in their efforts to comply with the present credit regulations, including their desire to pre-audit freight bills and to utilize mechanized procedures for payment of freight charges. There is not contention, however, by any shipper, that these difficult problems are insurmountable. The effect upon the rail carriers, on the other hand, cannot be disputed. To impose a longer period of time for the payment of freight charges would automatically result in the carriers providing increased working cash. For each day the credit period is extended it would necessarily have a severe impact upon employees, equipment, maintenance, and improvement programs of the railroads throughout all sections of the country. ***. For these reasons the examiner finds that the present credit period for the rail and motor carriers should be left undisturbed.

PART III

Freight Payment Plans

The record shows that there are many instances where individual shippers show a great amount of irritation when they are advised that their transportation bills must be paid within a definite time in order to avoid violating rules imposed by this Commission. Over the years, since the Commission has adopted definite rules and regulations with respect to extensions of credit to shippers by rail and motor common carrier, various facilities have been developed by independent agencies which are looked upon as being of assistance to both the carriers and the shippers in complying with those rules. One such facility is a clearing house known as Transport Clearings. There are 11 of

these carrier owned and operated clearing houses located in various parts of the country. Their purpose, methods, and names are almost identical. Specifically, Transport Clearings of Los Angeles is a cooperative incorporated in California operated by and for its member carriers under the direction of a Board of Governors elected from the membership. The area served by this office is roughly the southern half of California and Nevada, and the western half of Arizona. The prime purpose of Transport Clearings is to factor the bills of its carrier members so that they may receive cash payments for all bills presented each day. By handling all bills of its members, the extension of credit is effectively controlled and the violation of the Commission's rules is avoided. The Los Angeles office alone extends credit to over 50,000 shippers during a year's time. Over 24,000 accounts receive billings from its office each week. When Transport Clearings determines the regulations are being wilfully violated by a shipper and it cannot be persuaded to observe the regulations, the credit arrangement is terminated and notice thereof is furnished to all member carriers. While some 200 accounts were so restricted in 1963 about the same number became "reformed" and were reinstated. The transportation bills are acquired from member carriers and are paid for in cash on the date of receipt prior to the deadline. Such bills are purchased without recourse on the condition that the bill represents a legally valid charge and that it has not been previously collected. As strictly a third party in this transaction, credit losses are absorbed as an operating expense by Transport Clearings. In the fiscal year of 1963, Transport Clearings purchased from its member carriers 5,408,229 transportation bills with a face value of $125,742,190. The prepaid bills reach Transport Clearings within 36 to 50 hours after issue and collect bills the same approximate time after delivery of the shipment. The bills, in turn, are presented to the debtors on a time schedule that is formed to accommodate the debtors' wishes as near as possible, but in no event later than the time to bring them within the 7-days limit under the regulations. Payment is declared past due on the eighth day following presentation. The elapsed time, beginning with the date the bills are pur-

chased from the carrier, through the processing, mailing, and the receipt of the check from the debtor, is 11.5 days on commercial bills and 25.5 days on government bills.

In 1934 the railroads in the Chicago switching district organized an agency to collect freight transportation charges billed by the agency stations of the member roads located in the district and to supervise and control the extension of credit in accordance with the credit regulations. The agency referred to is the Chicago Railroad Freight Collection Association. The Association is made up of 29 member railroads who have appointed the Association to act as their agent in the collection of freight charges and the supervision of credit. Transportation bills are received from the agency stations of the member roads, classified, and consolidated for mailing to shipper-consignees for payment. The bills show the mailing date to mark the beginning of the credit period. Checks received by the Association are deposited in the bank each day and the sum so deposited is immediately distributed by transfer of funds to the credit of the member roads in an amount matching their respective collections. In 1963 the Association handled 1,306,484 bills with total collections amounting to $317,730,502. A credit list is maintained which shows the credit status and billing requirements of approximately 12,000 shippers. Bills unpaid after the expiration period are traced for payment. In January 1963, for example, out of 99,883 bills handled, the Association mailed 5,394 tracers. Approximately 130 patrons were placed on a cash basis in the previous 12-month period ending March 31, 1964, and it was reported that approximately 300 patrons were currently on a suspended credit list. The close attention given to the accounts of the Association when they become delinquent is said to be responsible for the very small number of bills more than 5 days delinquent. Of the total collections for 1963 an amount equivalent to only .0004 percent was returned to the carriers as uncollectible. This percentage of uncollectible bills corresponds almost exactly with the record shown by Transport Clearings.

The Association caused a survey to be made on February 27 and March 13, 1964, which dates were selected

at random, to determine the number and amount of delinquent bills collected on those dates. The final results for both dates are similar and therefore the results will be shown for February 27th. On that date 4,210 bills amounting to $1,111,339 were to be collected; 3,704 of those bills or 87.98 percent were paid within 120 hours of their presentation; within 5 days of the due date 448 bills or 10.64 percent of the total bills were paid; and 58 or 1.38 percent of the total bills amounting to $10,813 were paid more than 5 days after the due date. It is important to note that the survey was based entirely upon the mailing date of the bills. If the actual delivery dates were later, which happens in many instances, there would unquestionably be fewer violations than those shown.

The Chase Manhattan Bank and The Marine Midland Trust Company of New York offer freight payment plans. Both plans operate in a similar manner. The bank serves as a clearing house for the payment of freight charges billed by carrier members against shipper members. There is no charge to the shipper or receiver with the carrier paying a moderate service charge which is less than it would cost the carrier to carry on such operation in its own office. Participants are assigned membership numbers and each party is required to maintain an account with the bank. Freight bills are deposited by the carriers and upon receipt are credited to their account less any service charge the bank shall establish from time to time on each item. The freight bills are debited to the shippers or receivers' account on the same day and forwarded to them by mail for further accounting procedure. To protect a shipper in the event of a carrier overcharge or the erroneous debit of a bill to their account, the plan provides for the reversal of such entries within 30 days from the date of payment. In this way errors in the bills can be corrected without the necessity of a formal claim and the shipper receives immediate credit while the carrier is charged accordingly with appropriate explanation mailed to each. These freight payment plans provide an effective and uniform method of handling which insures prompt credit to the carrier and immediate payment by the shipper or consignee.

The Louisville and Nashville Railroad Company is taking full advantage of bank freight payment plans throughout the territory it serves. The railroad, because of the contentions of many of its shipper-consignees that the present credit period does not allow sufficient time for the pre-audit of freight bills, has found that cooperating with the banks in its area through the freight payment plan has proven satisfactory.

The most recent innovation in the nature of a freight payment plan is the inter-bank freight payment plan. This plan operates as a post office lock-box type arrangement. Under this plan the railroad freight agent prepares the freight bills and mails or delivers them to the nearest member bank for credit to his account. The bank will honor the arrangement even though the particular shipper involved does not have a freight payment account with the bank, provided the shipper does have a freight payment account with one of the other participating banks, and is a member of the inter-bank plan. This arrangement enables a shipper who has plants scattered throughout the country to handle his freight bills on a centralized bases, since all of the shippers' freight bills are eventually consolidated by the member bank in which the shipper maintains his freight payment account. The carriers serving the various plants of the shipper received immediate payment of the outstanding freight charges at the point where their freight bills are presented to the participating bank. This inter-bank plan extends to all parts of the country and is expanding. There are presently 20 member banks. There is no cost to the shipper to participate in this plan and the maximum cost assessed by any bank upon carrier is 5 cents per item which cost is subject to a reduction depending upon the volume of items handled. In any event the cost does not exceed the postage via ordinary mail.

On the basis of the showing made on this record with respect to the various freight payment, plans, it is recommended that the Commission encourage their use by both carriers and shippers. Such plans would appear to assist in the proper observance of the Commission's rules and regulations with respect to extensions of credit much better

and more effectively than many of the additional rules that have been suggested. ***

PART IV

Surety Bond Issue

To reduce the risk involved in extending credit to nonprofit transportation organizations, particularly shippers' associations, the Bureau recommends that the credit regulations be amended to provide that before extending credit to such organizations the carrier be required to obtain from the organization a surety bond sufficient to cover normal charges which may accrue based on its experience with the organization. In the alternative, it is recommended that the carrier be required to obtain a statement to the effect that the organization is not the beneficial owner of the goods being shipped and advising the carrier whom the beneficial owners are. While the evidence indicates that rail carriers encounter far more problems in this area than motor carriers, the Bureau believes that this requirement should be made applicable to both railroads and motor carriers.

In support of its position, the Bureau has cited instances where shippers' associations have been extended credit in large amounts and the participating carriers have suffered great losses due to the association being adjudged bankrupt. In one example, a shippers' association had assets of $1,300 at the time it became bankrupt and the amount owing its creditors was in excess of $350,000. The individual losses suffered by railroads amounted to as much as $89,000, $61,000, $45,000 and $6,000.

Under section 402(c) of the act shippers' associations are exempt from regulation. They consist of both unincorporated groups of individual shippers and incorporation nonprofit organizations. In conducting their affairs on a nonprofit basis various members receive the advantage of lower rates for transportation charges. These associations much of the time have little or no working capital and their organization is such that they are prohibited from accu-

mulating surpluses. Under such circumstances, it is argued that the common carriers assume a definite risk each time they extend credit to them and that the carriers can ill afford to absorb any loss that might result from such an operation. There is precedent for requiring a surety bond from all shippers who receive credit. However, the Bureau's proposal would apply only to nonprofit transportation organizations.

The opposition to the surety bond recommendation argues that a requirement for one class of shippers to be bonded without the same requirement being required of other shippers is discriminatory and contrary to the provisions of the act. Charter Oak Shippers Association, Inc., on behalf of numerous shipper associations urges the Commission to reject the Bureau's recommendation for a surety bond. Charter Oak has geared its operations to comply with the present credit regulations and does not object to a longer credit period insofar as the rail carriers are concerned. Neither would Charter Oak object to the Bureau's proposal that credit be withheld from a shipper until all past due charges are paid and the carrier receives written assurance that all future charges would be paid within the credit period. The Bureau has recommended that a surety bond be provided the carrier in the amount of at least $10,000 before credit is extended to these shippers. Charter Oak uses the service of some 40 railroads and motor common carriers. The cost in this case would be based on bonds totaling $350,000 to $400,000 which would entail a substantial expenditure. Charter Oak points to its excellent credit rating confirmed by a well-known commercial house and at the present time it has an excess of $50,000 on deposit in various banks. Its by-laws provide that each member shall deposit a sum equal to approximately two weeks' advance cost of transportation for his account so that working capital is no problem. Moreover, the by-laws provide that if a member becmes insolvent and unable to pay his transportation fees the members can be assessed in an amount necessary to cover such charges.

The by-laws of many of these shipper associations contain a provision absolving members from being liable for

the debts of other members. For this reason the National Association of Freight Forwarders supports the Bureau's position in requiring surety bonds before credit is extended to them. The American Institute for Shippers Associations, the NIT League and the railroad industry are opposed to the surety bond requirement.

A review of the evidence shows that the Bureau's recommendation is based almost entirely upon the action of bankruptcy taken by two shipper associations which resulted in substantial financial losses to various rail carriers. While this should not be condoned by the Commission it would appear that this area of business activity depending as it does upon the judgment of people having day-to-day dealings with their customers, should be free of regulatory requirements especially when they are not helpful. The railroads are opposed to any such bond requirement and it would appear their position is justified on the record made in this proceeding. Except for 2 or 3 instances, no losses have been sustained throughout the country by railroads or motor carriers extending credit to shippers' associations. To require a surety bond program of the kind recommended by the Bureau would be burdensome, would unnecessarily penalize large numbers of shippers whose credit record and payment record are beyond question, would present a continuous problem in maintaining records of changing membership in such associations and maintaining records and files of surety bonds, and would raise a very serious question as to whether such a requirement would be lawful under the provision of section 3(1) of the act which prohibits discrimination among shippers. The examiner finds that the record fails to show the necessity for requiring shipper associations to submit surety bonds before being extended credit for freight charges. It is concluded, therefore, that the Bureau's recommendation be rejected.

PART V

Specialized Carriers

There are certain types of motor common carriers, due to their specialized operations, that believe they should be exempt from the present credit rules, or in the alternative, exceptions should be provided for them. Motor carriers concerned with pipe line stringing operations, which are highly specialized and subject to conditions not pertinent to the operations of motor common carriers generally, are good examples.

The Commission has granted operating authority to certain motor common carriers engaged in the transportation of pipe, pipe line material, machinery, and equipment incidental to construction, repairing, and the dismantling of pipe lines including the stringing and picking up of pipe along the rights of way of pipe lines under construction. Pipe lines are constructed by transmission companies engaged in the business of transporting oils, gases, or other commodities suitable for pipe line transmission. While the motor carriers occasionally contract directly with the transmission company for the pipe stringing operation, generally they are required to contract with the prime contractor. As sub-contractors the motor carrier is bound by all the conditions, restrictions, and limitations in the contract between the transmission company and the prime contractor. The prime contractor is paid on the basis of estimates of work completed during periods specified by the contract which are usually 30-day or semi-monthly periods. The transmission company retains 20 percent of the estimated amounts due the prime contractor for purposes of security and those amounts are in turn withheld from the estimated amount due the carrier. Total payments are subject to adjustment upon final completion of the project. Under these circumstances it is not unusual to have $50,000 to $100,000 due upon completion of the pipe stringing job which has required several months to complete. Under such circumstances it is argued that strict compliance with the Commission's regulations relative to payment and collection of freight charges are impossible so far as pipe stringing

operations are concernd. Since the transmission companies for which the work is performed are well financed, the carriers feel they are not involved in a credit risk and in fact state that no losses have occurred in this respect. These carriers contend that since their operations are conducted pursuant to a contract and involve a temporary dedication of equipment to a specific project they should be treated as contract carriers for the purpose of promulgating rules regarding extension of credit. They are firmly of the opinion that the flexibility necessary to the negotiation of contracts for such services followed by proper performance requires them to be exempt from the rules relating to the extension of credit applicable to motor common carriers. Should the Commission decline such relief it is requested that the present rules be modified to permit these carriers to extend credit for a pereiod of 120 days following completion of a pipe stringing project.

Another example is the C & H Transportation Co., Inc., an irregular-route motor common carrier, specializing as a heavy hauler operating in 39 States. Many of its deliveries are made at job sites and field points, the exact locations of which are unknown until completion of the shipments. This carrier issues an average of 2,000 freight bills per month and each bill averages about $500. Many shipments are handled for small contractors, small machinery dealers, individuals, State and county governments, and small businesses which do not employ personnel trained and qualified in traffic problems. Frequently, shipments are consigned to the purchaser at its home office for additional instruction regarding the ultimate destination or delivery point. A substantial portion of this carriers' traffic consists of shipments which are moved through some States on special trip permits which prescribe the route of travel. The cost of the trip permit is charged to the customer and it is stated that the carriers' accounting office cannot issue freight bills until it has been advised of the total mileage and the special permit fee which is included in the billing. It is due to these complications with respect to this particular carrier that proposed amendments are made to the credit regulations. It is proposed that the freight bills be issued within

7 days after all information for the issuance of such bill is known to the carrier; that the extension of credit be on a month to month basis; and that the penalty provisions be provided against shippers for violations of the credit rules.

These specialized carriers, but for isolated instances, have been able to comply with the present regulations. There is no explanation on the part of these carriers why the charges cannot be computed within the 7-day period from the time of delivery as presently prescribed in section 188.3 of the CFR. Even in the case where mileage is unknown until delivery is achieved, 7 days seems ample time for the freight bills to issue. It is not sufficient to cause a change in the credit rules, for a carrier to simply allege that insisting upon payment of freight bills forces the customer to transfer his business elsewhere. There is no proof on this record that other carriers do not comply with the credit regulations. It is concluded that these so-called specialized carriers have failed to show the present rules are incompatible with their operation and the modification proposed by them are found to be unwarranted.

TITLE 49 — TRANSPORTATION
CHAPTER I — INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A — GENERAL RULES AND REGULATIONS
PART 142 — EXTENSION OF CREDIT TO SHIPPERS
TITLE 49 — TRANSPORTATION
CHAPTER I — INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B — GENERAL RULES AND REGULATIONS
PART 188 — EXTENSION OF CREDIT TO SHIPPERS

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of April, 1966.

Ex Parte No. 73

Regulations for Payment of Rates and Charges

Ex Parte No. MC-1

Payment of Rates and Charges of Motor Carriers

It appearing, That on July 15, 1963, the Commission entered an order instituting an investigation in these proceedings to determine whether rules and regulations governing the extension of credit for railroads and motor common carriers prescribed pursuant to authority granted in sections 3(2) and 223 of the Interstate Commerce Act, and published in the Code of Federal Regulations, were serving their purpose;

And it further appearing, That the Commission, on the date hereof, has made and filed its report herein setting forth the basis for its conclusions and findings, which report and prior reports in 57 I.C.C. 591, 59 I.C.C. 456, 63 I.C.C. 375, 69 I.C.C. 351, 171 I.C..C. 268, 273 I.C.C. 681, 310 I.C.C. 391, 313 I.C.C. 97, and 2 M.C.C. 365, are hereby referred to and made a part hereof:

It is ordered, That the following sections of Part 142, be, and they are hereby, revised and modified as follows:

Amend section 142.1 to read as follows:

> *Carrier may extend credit to shipper.* The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as set forth in this part. In regard to traffic of non-profit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the

carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading or at least have the bills of lading incorporate by reference a document containing the names of the beneficial owners.

Amend section 142.8 to read as follows:

Presentation of freight bills. Every carrier shall present freight bills for all transportation charges except those specifically excepted in this part to shippers prior to the first 12 o'clock midnight following forwarding of prepaid shipments or delivery of collect shipments except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the billing point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available at the billing point of the carrier. A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier. As used in this section the term "shipper" includes, but is not limited, to, freight forwarders, as well as shippers' associations and shippers' agents within the meaning of section 402(c) of part IV of the Interstate Commerce Act.

(Sec. 12, 24 Stat. 383 as amended; 49 U.S.C. 12, Interpret, or apply sec. 3, 24 Stat. 380, as amended: 49 U.S.C. 3).

It is further ordered, That the following section of Part 188 be, and it is hereby, revised and modified as follows:

Amend section 188.1 to read as follows:

Carrier may extend credit to shipper. Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor

vehicle may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days excluding Saturdays, Sundays, and legal holidays. When the freight bill covering a shipment is presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following delivery of the freight. When the freight bill is not presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following the presentation of the freight bill. In regard to traffic of nonprofit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading or at least have the bills of lading incorporate by reference a document containing the names of the beneficial owners.

(49 Stat. 546, as amended; 49 U.S.C. 304. Interpret, or apply 49 Stat. 565; 49 U.S.C. 323).

It is further ordered, That these amendments shall become effective July 21, 1966.

And it is further ordered, That notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D.C. and by filing with the Director, Office of the Federal Register.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1259

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Association of American Railroads hereby files its Brief *amicus curiae* in support of the Petition For Writ of Certiorari in this case, pursuant to Rule 42 of the Rules of the Supreme Court. The Brief is accompanied by written consent to its filing from the Solicitor General of the United States on behalf of the United States of America. The Denver & Rio Grande Western Railroad Company has consented to the filing of this Brief by letter of March 19, 1968 addressed to the Clerk of the Supreme Court. Such letter is in the possession of the Clerk of this Court.

I. INTEREST OF THE AMICUS CURIAE

The Association of American Railroads (the AAR) is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico. The member railroads operate more than 95 per cent of the total railroad mileage and have operating revenues of approximately 98 per cent of the total railroad operating revenues of all railroads in the United States. The activities of the AAR cover a wide range, having to do with such matters as research, operations, car service, safety, public relations, accounting, statistics, law, and Federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

The AAR is the joint representative and agent of these railroads in connection with legal matters of common concern to the industry as a whole. It has an interest in significant interpretations of Federal legislation that will apply generally to all of its members. The issues raised in the present case relating to the credit regulations (49 C.F.R. §§ 142.1-142.14) promulgated by the Interstate Commerce Commission [1] pursuant to section 3(2) of the Interstate Commerce Act (49 U.S.C. § 3(2)), and the proper construction of the limited penalty provisions of Section 16(8) of that Act (49 U.S.C. § 16(8)), are important to the entire railroad industry.

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[1] The continuing docket number of Interstate Commerce Commission proceedings conducted pursuant to Section 3(2) of the Interstate Commerce Act (49 U.S.C. § § 3(2)) is Ex Parte No. 73. See, *Regulation of Payment for Rates & Charges*, 57 I.C.C. 591 (1920).

II. REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States should grant the Petition For Writ of Certiorari because the decision of the Court of Appeals for the Tenth Circuit is in error; because the error has an important adverse impact upon a fundamental principal of federal administrative law; and because such error, if not corrected, will result in continuing injury to the entire railroad industry of the United States. It is the latter reason which has caused this *amicus curiae* Brief to be filed.

Every railroad operating in interstate commerce in the United States is subject to the credit regulations of the Interstate Commerce Commission (49 C.F.R. §§ 142.1—142.14). Likewise, every such railroad is subject to enforcement proceedings for violation of Section 3(2) of the Interstate Commerce Act (49 U.S.C. § 3 (2)). It is a matter of great importance to the railroads that the proper enforcement statute be utilized and that the excessive and inflexible forfeiture provisions of Section 16(8) (49 U.S.C. § 16(8)) not be used erroneously for such purpose.

As a result of the decision below every shipment of freight moved by railroad under a bill of lading in interstate commerce and delivered to a consignee in the United States carries with it the potential subjection of the collecting carrier to the forfeiture provisions of Section 16(8). In 1966, the most recent year for which figures are available, there were over 19 million such shipments for carload traffic alone.[2]

[2] This estimate is based upon the Freight Commodities Reports (I.C.C. Form QCS) submitted to the Interstate Commerce Commission by individual railroads for 1966 adjusted to eliminate intrastate shipments by use of Carload Waybill Statistics 1964 (I.C.C. Statement SS-1) August 1967.

The immense volume of rail movements in interstate commerce thus affected implores the consideration by this Court of the issues raised below. Perhaps of equal importance it reflects the nature of the credit regulation (49 C.F.R. §§ 142.1—142.14) which have been adopted to cope with the problem presented by the settlement of rates and charges. The regulations deal with an area of exchange in which the payment of charges or the failure to do so promptly is not entirely within the controllable province of the regulated carrier. Some violations of the credit regulations are inevitable and the Interstate Commerce Commission expressly found in a 1966 decision "... that shippers are the major cause of violations." *Regulation of Rates and Charges,* 326 I.C.C. 483, 487 (Docket Ex Parte No. 73, 1966). The subjection of the carriers to the extreme forfeiture provisions of Section 16(8) for "violations" is clearly inconsistent with such circumstances.

In the latest proceeding under Docket Ex Parte No. 73 the Bureau of Enforcement of the Interstate Commerce Commission sought to make the credit regulations more stringent. The Commission declined to do so stating that:

> "[T]here are many reasons for credit violations which are beyond correction by rules; [and] stringent credit rules as proposed by the Bureau would destroy the flexibility needed to meet problems of this nature." (Id. at 489-490)

If the credit regulations are held to be subject to the harsh forfeiture provisions of Section 16(8) they become rigid and incapable of meeting "problems of this nature." Section 16(8) forfeitures are not suitable for enforcement of regulations like the credit regulations,

and the clear language of Section 16(8) and Section 3 (2), read together, precludes such use.

The Court of Appeals, without a proper statutory basis has unwarrantedly increased the scope of the forfeiture provision of Section 16(8) and the enforcement provision of Section 16(9) of the Interstate Commerce Act, as amended (49 U.S.C. §§ 16(8) and 16(9)). The holding of that Court is based on an erroneous and inconsistent interpretation of Section 3(2) of that Act (49 U.S.C. § 3(2)), and the credit regulations issued pursuant thereto (49 C.F.R. §§ 142.1—142.14).

The question of the interrelationship between Sections 16(8) and 3(2) of the Interstate Commerce Act, which the Court of Appeals deems to exist, has not been considered by this Court prior to this case. Indeed, the issues raised below, had until this case, never been considered by a Federal Court of appellate jurisdiction, because for the first forty-four years that these two sections were in existence a violation of the credit regulations had not been considered punishable under the forfeiture provisions of Section 16(8).

Within Section 3(2) of the Interstate Commerce Act Congress has authorized the Interstate Commerce Commission to establish "rules and regulations" and has specifically omitted any reference to "orders" therein. The opinion of the Court of Appeals which incorrectly inserts the word "orders" into Section 3(2) would appear, in at least one respect, to be in conflict with *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947). In that case this Court ruled that the absence of the word "order" in Section 309 of the Interstate Commerce Act, (49 U.S.C. § 909), prohibits the Commission and the Courts from including it. The Supreme Court should

grant the Petition filed herein and review the apparent inconsistency of the Court of Appeals' decision.

The Court of Appeals made no reference to the *Seatrain* case but did incorrectly refer to a statement made by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947). Citing the *Chenery* case the lower court referred to the purpose of the "order" in Docket Ex Parte No. 73 as being to fill the gap in the "interstices of the Act * * * through * * * quasi legislative promulgation of rules." The *Chenery* case has no application here. This Court did not, in that case, say that rules are the same as orders nor did it say that the use of the clause "it is ordered" makes a rule an order (as does the Court of Appeals). In its discussion, however, the Supreme Court observed that rule-making, as much as possible, should be performed by promulgation of rules to be applied in the future rather than to rely upon *ad hoc* adjudication. Id. at 202.

In clear and unambiguous terms Section 16(8) provides a forfeiture for violation of "any order" issued under Section 3 of the Act. Paragraph (2) of Section 3, however, in clear and unambiguous terms authorizes the Commission to prescribe "rules and regulations" to govern the settlement of rates and charges and makes no mention of "orders." In considering the meaning of the term "any order" in Section 16(8) the Court of Appeals held that:

> "An unambiguous statute must be given effect according to its plain and obvious meaning. [citations omitted] We find no ambiguity in § 16(8)." 385 F.2d 161, 163 (10th Cir. 1967)

Equally plain and obvious are the terms "rules and regulations" used in Section 3(2). There is no ambiguity there. It is difficult to understand how the lower

court can ignore the "plain and obvious meaning" of Section 3(2) and rewrite it to accommodate Section 16(8). But leaving aside the fact that these provisions are clear on their face, reference to the legislative history supports the same interpretation.

The legislative history of Section 16(8) and Section 3(2) indicates that there is no direct relationship between the two. As originally passed by the House of Representatives as Section 424 of H.R. 10453 [3] and as passed by the Senate as Section 46 of the Senate amendment to H.R. 10453,[4] what is now Section 16(8) was written in its present form. The House and Senate versions differed to some degree on the provisions contained in Section 3 relating to joint use of terminals and facilities but neither version contained the provision relative to the extension of credit.[5]

The report which had accompanied the original House passed version clearly stated that the intent of Section 424 thereof was to amend Section 16 to

> include under the penalty provisions for failure to obey orders of the Commission, the failure to obey orders made under the provisions (1) regarding the joint use of terminals and (2) change of interstate rates where the Commission finds that such rates constitute an undue preference. . . .[6]

[3] 66th Cong., 1st Sess. (1919)

[4] 66th Cong., 2d Sess. (1919)

[5] Section 405 of H. R. 10453 as originally passed by the House amended Section 3 with respect to the joint use of facilities and terminals, giving the Commission the authority to require by order such joint use while Section 36 of the Senate's amended version of H. R. 10453 failed to extend this authority to the Commission.

[6] H. R. Rep. No. 456, 66th Cong., 1st Sess., 30 (1919)

Obviously Section 16(8) was not intended to apply to the credit provisions because they were not a part of the bill at that time. The provisions to which Section 16(8) was to apply, however, were clearly indicated. This above quoted provision of H.R. Report No. 456 is the most accurate and compelling statement of congressional intent as to the new subject matter to which Section 16(8) was to apply after 1920.

It must be noted that Section 16(8) was not changed after H.R. Report No. 456 was written. Yet, with Section 16(8) in its final form Congress added what is now Section 3(2).[7] With the knowledge that Section 16(8) referred only to Commission "orders," Congress specifically omitted any reference to orders in Section 3(2). Instead, authorization was extended to prescribe "rules and regulations" when the House and Senate conferees met to rewrite Section 3 as it finally appeared.

The decision of the Court of Appeals is in derogation of the congressional intent as is clearly established by the legislative history of these two sections.

In 1927 Congress amended Section 3(2)[8] as an expression of intent that the Interstate Commerce Commission be given the freedom to give full consideration to the needs of carriers and shippers in establishing the credit regulations. Prior to 1927 Section 3(2) had provided that the rules were "to assure prompt payment" of the charges. (Transportation Act of 1920, § 405, 41 Stat. 479). These words gave way to the words "govern the settlement" of charges. In the one rele-

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[7] Conference Report, H. R. Rep. No. 650, 66th Cong., 2d Sess., 27 and 63 (1920).

[8] 44 Stat. 1447 (1927)

vant statement of the intent of Congress in making this change it was stated that the new language

> . . .would permit of a sufficient additional freedom of action on the part of the Commission in providing the rules and regulations to accomplish [a liberalization of the credit regulations].[9]

Such language necessarily bespeaks an intent that the determinative "orders" referred to in Section 16(8) are not contemplated by the authority granted in Section 3(2) where it expressly provides for the establishment of "rules and regulations." The Court of Appeals decision ignores the legislative intent and runs contrary to the procedures Congress has adopted to enable the Commission to regulate the settlement of charges between carrier and shipper.

Section 16(8) has absolutely no direct relation to the clear purpose of the credit regulations promulgated by the Interstate Commerce Commission under authority of Section 3(2). It should be clearly settled by this Court that the regulations issued by the Interstate Commerce Commission under authority of Section 3(2) are not "orders" and that the forfeiture provisions of Section 16(8) cannot be expanded in an attempt to reach alleged deviations from the Commission's credit regulations.

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[9] S. Rep. No. 1508, 69th Cong., 2d Sess., 2 (1927) to accompany H. R. 12065. The amendment to Sec. 3(2) contained in H. R. 12065 was identical to that contained in S. 3286 which was subsequently enacted in lieu of H. R. 12065 (Act of March 4, 1927, 44 Stat. 1447). The abbreviated reports which accompanied S. 3286 [H.R. Rep. No. 2282 and S. Rep. No. 309, 69th Cong., 2d Sess. (1927)] did not contain any reference to the change in Section 3(2).

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be issued as requested by the Denver & Rio Grande Western Railroad Company.

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March 29, 1968

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid.

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Association of American Railroads

March 29, 1968.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1259

DENVER AND RIO GRANDE WESTERN RAILROAD CO.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Utah (Pet. App. B–1) is not reported.[1] The opinion of the court of appeals (Pet. App. A) is reported at 385 F. 2d 161.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1967 (Pet. App. A). A petition for re-

[1] The district court cited as the basis for its action a memorandum decision previously entered by it in an identical case, *United States of America* v. *Western Pacific Railroad Co.* The cases were subsequently consolidated on appeal. The *Western Pacific* decision of the district court is reprinted at Pet. App. B–2.

297–989—68——1

hearing was denied without opinion on December 26, 1967. The petition for a writ of certiorari was filed on March 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Ex Parte No. 73, governing the extension of credit by railroads, is an order of the Interstate Commerce Commission enforceable under Section 16 (8) of the Interstate Commerce Act, providing for civil fines for a violation of "any order" of the I.C.C.

STATUTES, REGULATION AND ORDERS INVOLVED

The relevant provisions of the Interstate Commerce Act and of the regulations and orders of the Interstate Commerce Commission are set forth in an appendix to this brief, pp. 11–18 *infra*.

STATEMENT

Section 3(2) of the Interstate Commerce Act, 49 U.S.C. 3(2) (p. 11 *infra*), expressly confers upon the Interstate Commerce Commission the power to regulate the extension of credit by railroads to shippers of freight. By its terms, that section prohibits the granting of credit to a shipper for freight charges except as specifically authorized by the I.C.C. Thus, save to the extent that credit is administratively authorized, all freight deliveries must be on a cash-only basis.

Since 1920, pursuant to this authority, the I.C.C., through an order denominated Ex Parte No. 73 (pp. 13–15 *infra*), has strictly limited the time period in which railroads must obtain payment of freight

charges, in order to prevent unjust discriminations among shippers. In 1920, Ex Parte No. 73 required cash payment within a maximum of 96 hours of the delivery of the freight. It was modified by subsequent orders of the I.C.C., issued in 1960, to provide that the maximum period would be 120 hours (pp. 15–18 *infra*).[2]

Sections 16(8) and 16(9) of the Interstate Commerce Act, 49 U.S.C. 16(8), 16(9) (p. 12 *infra*), provide a means for the I.C.C. to enforce orders issued under certain sections of the Act, including Section 3. Specifically, Section 16(8) states in part that:

> any carrier * * * who knowingly fails or neglects to obey *any order* made under the provisions of sections 3, 13, or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. [Emphasis added.]

Section 16(9) provides for the recovery of the forfeiture by the United States by civil suit brought in a district court in any district in which the railroad operates.

On November 1, 1965, the United States commenced this suit against petitioner in the District of Utah. The complaint alleged that the petitioner "frequently and knowingly engaged in the practice of extending credit in excess of 120 hours" in violation of Ex Parte No. 73. (R. 83).[3] The complaint further alleged three

[2] The time limits for the extension of credit established by Ex Parte No. 73, as amended, are also set forth by the I.C.C. as regulations in the Code of Federal Regulations. 49 C.F.R. 142.1b (pp. 12–13 *infra*).

[3] "R." refers to the printed record on appeal filed in the court of appeals.

specific instances of illegal extensions of credit by petitioner for periods ranging from 23 days to 33 days (R. 83–85), and sought statutory forfeitures based upon each of the three violations alleged (R. 86).

The district court dismissed the complaint, ruling that Ex Parte No. 73 was "legislative in character" and not the type of order encompassed by Section 16(8). The court of appeals reversed and remanded the case for trial, holding that Ex Parte No. 73 was an order of the I.C.C. within the meaning of Section 16(8) (Pet. App. A).

ARGUMENT

The decision of the court of appeals correctly gives effect to the plain terms of Section 16(8) and is not in conflict with prior decisions of this Court or any other court.[4] Accordingly, further review would not be warranted even if the decision of the court of appeals were a final judgment. There are no special circumstances calling for review by this Court at the present interlocutory stage of the litigation.

1. The language of Ex Parte No. 73 clearly indicates that it is an order. The decree, both as orig-

[4] The *amicus* brief filed by the Association of American Railroads suggests (Amicus Br. p. 5) that the decision below "would appear" to be in conflict with the decision of this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424. A reading of that decision, however, discloses no conflict, real or apparent. *Seatrain* involved an interpretation of a different part of the Interstate Commerce Act, Part III, which regulates water carriers, and dealt with the entirely discrete issue of the difference between the words "order" and "certificate of public convenience" as used in that Part.

inally promulgated in 1920 and as amended in 1960, is headed "ORDER" and employs such phrases as "It is ordered" and "It is further ordered" (pp. 13–18 *infra*). Moreover, Ex Parte No. 73 speaks of reports, investigatory proceedings, hearings, findings, and conclusions, and incorporates such findings and conclusions into the decree (pp. 14, 16–17 *infra*).

The procedure followed by the I.C.C. in promulgating Ex Parte No. 73 and its amendments confirms that it is an order. Section 13(2) of the Interstate Commerce Act, 49 U.S.C. 13(2) (pp. 11–12 *infra*), specifies the procedure to be followed by the I.C.C. in issuing an order. That section provides that the I.C.C. may institute hearings on any matter arising under any provision of the Act and issue orders relating to any matter with which the hearings are concerned. Such orders are to be served upon the railroads. (49 U.S.C. 16(5)).

These procedures were followed in the promulgation of Ex Parte No. 73. The record shows that Ex Parte No. 73 and its amendments were issued after the I.C.C. conducted an investigation and held hearings, notice of which was given to the railroads, who participated in the hearings as parties. Findings of fact and conclusions were made based upon the record developed at the hearing, a report of the I.C.C. was written and filed and appropriate service was made on the railroads (Pet. App. D, pp. 1–13, 42–54; pp. 15–17 *infra*).

Petitioner argues that (Pet. pp. 10–12) the decree is not an order because it fits the definition of "rule" in the Administrative Procedure Act. 5 U.S.C. 551(4)

(Supp. II, 1965–66) (reprinted Pet. App. C, pp. 12–13). But it can equally be argued that Ex Parte No. 73 fits the definition of "order" in the A.P.A. 5 U.S.C. 551(6) (Supp. II, 1965–66) (reprinted Pet. App. C, p. 13). As Professor Davis stated in his treatise:

> The APA by no means solves all problems of classifying proceedings as rule making or adjudication. Most questions concerning classifications of borderline and mixed functions still remain. [1 Davis, Administrative Law, p. 297].

The failure of I.C.C. proceedings and procedures to fit precisely the A.P.A. definitions also may be explained in part by the fact that the Interstate Commerce Act, including the section governing the regulation of credit by railroads, predates the A.P.A. But while the A.P.A. does not clearly place Ex Parte No. 73 in the category of rule or order, we have noted that the procedure followed in the issuance of the decree satisfies the provisions of the Interstate Commerce Act specifying the procedures to be utilized by the I.C.C. in issuing orders. This is the directly relevant, unambiguous guidepost for the I.C.C.

Decisions of this Court, as well as the lower courts, have uniformly treated other decrees of the I.C.C., similar in form and scope to Ex Parte No. 73, as orders of the I.C.C. See, *e.g., United States* v. *Baltimore and Ohio R. Co.,* 293 U.S. 454; *United States* v. *Southern Ry. Co.,* 364 F. 2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031; *State of Georgia* v. *United States,* 201 F. Supp. 813 (N.D. Ga.), affirmed *per curiam,* 371 U.S. 9. The broad scope or legislative nature of I.C.C. decrees has not prevented them from having legal

effect as orders. For example, in the *Assigned Car Cases*, 274 U.S. 564, 574–575, this Court treated a decree regarding the assignment of freight cars as an order even though the decree was "wholly legislative" and prescribed a "uniform rule" and was not based on specific inquiry into a particular practice of an individual carrier. See, also, *United States* v. *Southern Ry. Co.*, 380 F. 2d 49, 52 (C.A. 4).[5]

2. Petitioner further contends (Pet. pp. 7–8) that the I.C.C. has no authority to issue any credit order under Section 3(2).[6] However, Section 13(2) (pp. 11–12 *infra*), authorized the I.C.C. to issue such an order:

> [T]he Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, * * * as to any matter * * * concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. *And the said Commission shall have the* * * *

[5] The I.C.C. is not the only agency that issues broad decrees similar to Ex Parte No. 73 which are treated by the courts as orders. See, *e.g.*, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 425.

[6] To the extent the argument that the I.C.C. had no authority to issue an order regulating credit involves an attack upon the validity of the credit order, the courts are without jurisdiction to decide the issue in this case. A challenge to the validity of any order of the I.C.C. may be made only through special proceedings before the I.C.C. leading to judicial review by a three-judge court with direct appeal to this Court. See 28 U.S.C. 1253, 2325, 49 U.S.C. §§ 17(6), 17(9); *United States* v. *Southern Ry.*, 380 F. 2d 49 (C.A. 4); *United States* v. *Southern Ry.*, 364 F. 2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031.

> *power to make and enforce any order * * * relating to the matter * * * concerning which the inquiry is had * * *.* [Emphasis added.]

Thus, in issuing Ex Parte No. 73, the I.C.C., pursuant to Section 13(2), conducted inquiry or hearing on a "matter" involving the extension of credit arising under Section 3(2), one of the "provisions of this chapter". Based on this hearing, it formulated and issued an order "relating to the matter * * * concerning which the inquiry [was] had * * *" limiting the extension of credit to no more than 120 hours.[7]

Petitioner points, however, to the fact that Section 3(2) refers to "rules and regulations" and urges that this reference deprives the I.C.C. of the power also to issue an order thereunder (Pet. pp. 7–8). This contention not only overlooks the express statutory authorization in Section 13(2) for issuing an order, but also is premised upon an unduly literal and restrictive interpretation of the Interstate Commerce Act.

The Interstate Commerce Act is remedial in nature and, therefore, is to be liberally construed to accomplish the public purpose which it was enacted to serve. *New York, N.H. and H.R.R.* v. *I.C.C.*, 200 U.S. 361, 391. Nevertheless, petitioner urges (Pet. pp. 7–8) a narrow construction that would unduly constrict the I.C.C.'s remedial powers to achieve the purpose of the

[7] Since Section 16(8) of the Act provides for civil forfeitures for a violation of "any order" of the I.C.C. made under § 3 or § 13, it is immaterial whether Ex Parte No. 73 is viewed as arising under § 13 or § 3(2) or both.

legislation.[8] In a markedly similar context, such a narrow construction was necessarily rejected in the *Assigned Car Cases*, 274 U.S. 564, in which this Court upheld an "order" of the I.C.C. that was issued under Section 1(14) of the Act, 49 U.S.C. 1(14), which by its express terms provides only for *"rules, regulations, and practices."*[9]

3. Petitioner correctly notes that a railroad violating the credit restrictions promulgated by the I.C.C. may be subject to criminal penalties under Section 10(1) of the Interstate Commerce Act, 49 U.S.C. 10(1), and Section 1 of the Elkins Act, 49 U.S.C. 41(1) (both reprinted Pet. App. C. pp. 3–4, pp. 11–12), as well as civil sanctions under Section 16(8) of the Interstate Commerce Act (Pet. pp. 12–13). However, the mere fact that certain conduct of petitioner has been construed as subjecting it to the possibility of either civil or criminal sanctions under

[8] Nothing in the legislative history discussed by the *amicus* demonstrates that Congress intended to deprive the I.C.C. of authority to issue orders regulating credit (Amicus Br. pp. 7–9). If anything, the legislative history supports the position that Congress intended the I.C.C. to use § 16(8) to enforce orders issued under § 3(2) for at the time Congress amended the Interstate Commerce Act to add Section 3(2), 41 Stat. 479, it also amended the Act to add Section 16(8), 41 Stat. 492, providing for a forfeiture for a violation of "any order" issued, *inter alia*, under Section 3.

[9] The language employed by Congress in conferring regulatory powers upon the I.C.C. varies from provision to provision of the Act. For example, § 13(3) permits the I.C.C. to make "*rules*"; § 5(b) "*rules and regulations*"; § 15(1) "order"; § 15(2) "orders"; § 15(9) "*order, rule, or regulation*"; § 1(16) "*directions*"; § 1(14) "*rules, regulations, and practices*".

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different statutory sections, or both, does not, as petitioner maintains, mean there is a conflict between these statutory sections. The statutory scheme clearly provides—and this is far from uncommon—that the agency shall have two different enforcement remedies available, one civil and one criminal, to be used separately or in conjunction, at the discretion of the authorities.[10]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[10] The civil penalty provided for by § 16(8) is a mandatory fine of $5,000 for each offense. As noted, pp. 3–4 *supra*, petitioner is being sued by the I.C.C. for a total $15,000 for three separate offenses involving delays in collecting freight payments ranging from 23 to 33 days.

The criminal penalties provided by 49 U.S.C. 10(1) and 41(1) with regard to rate discriminations are conviction of a misdemeanor with imprisonment for up to two years and/or a maximum fine of $20,000.

APPENDIX

1. The relevant provisions of the Interstate Commerce Act, 24 Stat. 379, 49 U.S.C. 1 *et seq.* are as follows:

Section 3(2), 49 U.S.C. 3(2) provides as follows:

> No carrier by railroad * * * subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight * * * shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges * * *.

Section 13(2), 49 U.S.C. 13(2) provides as follows:

> Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by

complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

Section 16(8), 49 U.S.C. 16(8) provides as follows:

> Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13 or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Section 16(9), 49 U.S.C. 16(9) provides as follows:

> The forfeiture provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

2. The relevant provisions of 49 C.F.R. 142.1b, are as follows:

> Effective on March 10, 1961, the rail carriers subject to the jurisdiction of the Interstate Commerce Commission are hereby authorized to extend credit for 96 hours and 120 hours in

respect of charges on carload traffic, in lieu of 48 hours and 96 hours, respectively, under the present rules in this part, computation of time to be made in the same manner as provided in connection with the 48-hour and 96 hour periods.

3. The relevant provisions of Ex Parte 73 and its amendments are as follows:

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 4th day of June, A.D. 1920.

Ex Parte No. 73.

In re Section 3 of the Interstate Commerce Act, as amended by Section 405 of the Transportation Act, 1920.

It appearing, That section 3, paragraph (2), of the interstate commerce act, as amended by section 405 of the transportation act, 1920, provides:

From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the following rules and regulations be, and they are hereby, prescribed to become effective on July 1, 1920, and to remain in force until the further order of the Commission:

1. Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to insure payment of the tariff charges within the period of credit herein specified, may relinquish possession of the freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons being here in called shippers, for a period of ninety-six hours to be computed as follows:

(A) Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight the ninety-six hours of credit shall run from the first 4:00 p.m., following the delivery of the freight.

(B) Where the freight bill is presented to the shipper subsequent to the time the freight is delivered the ninety-six hours of credit shall run from the first 4:00 p.m., following the presentation of the freight bill.

2. Every such carrier shall present freight bills to shippers not later than the first 4 p.m. following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then avail-

able to the carrier at the delivery point, the freight bills shall be presented not later than the the first 4 p.m., following the day upon which sufficient information becomes available to the delivering agent of the carrier.

3. Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

4. Sundays and legal holidays, other than Saturday half holidays, may be excluded from the computation of the period of credit.

5. The mailing by the shipper of valid checks, drafts, or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

ORDER

Title 49—Transportation; Chapter I—Interstate Commerce Commission; Subchapter A—General Rules and Regulations; Part 142—Extension of Credit to Shippers.

Ex Parte No. 73

Regulations For Payment of Charges

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 19th day of May, A.D. 1960.

It appearing, That by order dated August 6, 1958, the Commission reopened this proceeding

for further hearing for the purpose of determining whether the time should be extended within which freight charges on carload traffic may be paid;

It further appearing, That a further hearing has been held, and that a full investigation of the matters and things involved has been made, and the Commission, on the date hereof, having made and filed a report on further hearing, which report, together with the prior reports herein, are hereby referred to and made a part hereof:

It is ordered, That the order entered herein on January 20, 1931, as modified, and the regulations issued thereunder, 49 CFR 142, be, and they are hereby further modified by adding after § 142.1a the following:

§ 142.1b Carload traffic. Effective on July 7, 1960, the rail carriers subject to the jurisdiction of the Interstate Commerce Commission are hereby authorized to extend credit for 96 hours and 120 hours in respect of charges on carload traffic, in lieu of 48 hours and 96 hours, respectively, under the present rules in this part, computation of time to be made in the same manner as provided in connection with the 48-hour and 96-hour periods. (See Sec. 142.2)

It is further ordered, That in all other respects said order of January 20, 1931, as modified, and said regulations shall remain in full force and effect.

And it is further ordered, That notice to the general public shall be given by depositing a copy hereof in the Office of the Secretary of the Commission, Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

(Sec. 3(2), 24 Stat. 380, as amended, 49 U.S.C. 3.)

By the Commission.

ORDER

Title 49—Transportation; Chapter I—Interstate Commerce Commission; Subchapter A—General Rules and Regulations; Part 142—Extension of Credit to Shippers

Ex Parte No. 73

Regulations For Payment Of Charges

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 30th day of December, A.D. 1960.

It appearing, That on May 19, 1960, the Commission made and filed a report and order in this proceeding, 310 I.C.C. 391, and that thereafter, upon petition of the protestants and replies thereto, the proceeding was reopened for reconsideration;

It further appearing, That the Commission, on the date hereof, has made and filed a report on reconsideration, which report, together with the prior reports and orders herein, are hereby referred to and made a part hereof:

It is ordered, That the order entered in this proceeding on May 19, 1960, as modified, authorizing the extension of credit on carload traffic to 96 hours and 120 hours, in lieu of 48 hours and 96 hours, respectively, the effective date of which was postponed until the further order of the Commission, be, and it is hereby, reinstated and modified, so as to become effective on March 10, 1961.

It is further ordered, That the regulations issued under the order of May 19, 1960, as modified, 49 CFR 142.1b, be, and they are hereby, further modified by deleting the date of July 7, 1960, and substituting in its place the date March 10, 1961.

It is further ordered, That in all other respects said order of May 19, 1960, as modified, and said regulations shall remain in full force and effect.

And it is further ordered, that notice to the general public shall be given by depositing a copy hereof in the Office of the Secretary of the Commission, Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

(Sec. 3(2), 24 Stat. 380, as amended, 49 U.S.C. 3)

By the Commission.

U.S. GOVERNMENT PRINTING OFFICE: 1960